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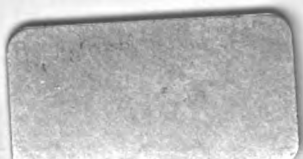
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LAW AND EQUITY

OF THE

STATE OF ARKANSAS.

BY ALBERT PIKE,
Counsellor at Law.

VOL. II.



LITTLE ROCK:

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JUDGES
OF THE
SUPREME COURT OF LAW AND EQUITY,
OF THE
STATE OF ARKANSAS,
DURING THE TIME OF THE SECOND VOLUME OF THESE REPORTS.

DANIEL RINGO, *Chief Justice.*
THOMAS J. LACY,
TOWNSEND DICKINSON, } *Judges.*

CIRCUIT JUDGES.

FIRST CIRCUIT,
WILLIAM K. SEBASTIAN.

SECOND CIRCUIT,
ISAAC BAKER.

THIRD CIRCUIT,
THOMAS W. JOHNSON.

FOURTH CIRCUIT,
JOSEPH M. HOGE.

FIFTH CIRCUIT,
JOHN J. CLENDENIN.

SIXTH CIRCUIT,
WILLIAM CONWAY B.

SEVENTH CIRCUIT,
RICHARD C. S. BROWN.

ROBERT W. JOHNSON, *Attorney General.*

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF ARKANSAS,
In July Term, A. D. 1839, being the sixty-fourth year of our
Independence.

NOTE.—At this term, DICKINSON, J. was not on the Bench.

WOOLFORD *et al.* against HOWELL.

ERROR to Pulaski Circuit Court.

Where an action was commenced against two defendants, before a justice, who rendered judgment by default against the defendants without any appearance, and it appears from his docket merely that "the defendant" appealed; if judgment is again rendered by default in the Circuit Court against both defendants, it is error.

In such case, the entry in the record of the Circuit Court, of the appearance of "the parties," must be considered as applying only to those who were under legal obligation to appear, by service of process, or otherwise.

The rule in *Gilbreath v. Kuykendall* renewed.

This action was commenced before a Justice of the Peace, on a writing obligatory for the sum of \$45 50, payable to *William C. and Thomas J. Howell*, and subscribed in the name of *Israel Woolford and Co.*

By the original summons, the constable was commanded to summon *Israel Woolford* and *John Latham*, partners in trade, under the firm of *Israel Woolford and Co.*, to appear before the Justice of the Peace, to answer unto *Thomas J. Howell*, survivor of the late firm of *William C. Howell* and *Thomas J. Howell*, in an action on a bond. The summons appeared to have been duly served on *Woolford*, but did not appear to have been served on *Latham* at any time, or in any manner whatever. On the 19th day of November, 1838, two days

Woolford *et al.* against Howell.

after the day to which the summons was returnable, the Justice gave judgment, by default, in favor of Howell, against Woolford and Latham, for \$45 50 debt, and \$1 15 damages, together with the costs of suit, from which judgment an appeal to the Circuit Court was prayed, and an entry made by the Justice of the Peace on his docket, as follows :

“ December 11th, 1838.

“ This day came the defendant, and prayed an appeal unto the next Circuit Court of Pulaski county, and offered Joseph W. McKnight special bail for his said appeal. Whereupon, the said McKnight came personally before me, and acknowledged himself jointly bound with the above named defendant to pay the costs and condemnation of the said Circuit Court. By virtue of this appeal, the case was taken up to the Circuit Court, and an entry made of record therein as follows: Thomas J. Howell, survivor of the late firm of W. C. and Thomas J. Howell, appellee, *vs.* Israel Woolford and John Latham, partners, &c., appellants. On this day came the said parties, by attorneys, and the appellants saying nothing to bar or preclude the affirmation of the Justice’s judgment in this case, and the Court having inspected the transcript of the Justice’s judgment, affirmed the same. After which, judgment was formally given and entered by the Court, for the full amount of the debt, and damages for the detention thereof, and all of the costs of suit, in favor of said Howell, against the said Woolford and Latham, and McKnight, as their security in the appeal, to reverse which they prosecuted their writ of error.

TRAPNALL & COCKE, for pl. in error.

The principle is too well settled to require any illustration from authority, that a judgment cannot be rendered against a party until he has been served with the necessary process to bring him into court.

The principle is no less clear, that one partner cannot bind another by note under seal. 2d *Marsh.* 376, *Trimble vs. Coons*; 3d *Monroe* 436.

When three parties are sued, and process executed upon two, the term “ *defts. appeared,*” and “ *the parties appeared,*” shall apply only to those who have been served with process. *Violet v. Waters*, 1 J. J. *Marsh.* 303.

Woolford *et al.* against Howell.

Ringo, *Chief Justice*, delivered the opinion of the Court:

Several errors have been assigned, which are considered by the Court as unimportant, and not necessary to be noticed, as the case must be decided upon the assignment which questions the correctness of the judgment, on the ground that it appears by the record, that Latham was not served with process to appear, and never did enter his appearance to the action.

That the summons was not served on Latham, is manifest from the return of the Constable thereon endorsed, consequently he was under no legal obligation to appear; and, according to the principle stated and acted upon by this Court, in the case of *Smith vs. Stinnett*, which is believed to be right in itself, and fully sustained by the authorities there cited, the entries, as made of record in this case, must be regarded as only applying to, and embracing such of the parties, as by the service of process on them were legally bound to appear, but cannot be considered as constituting or establishing an appearance on the part of those not served with process to appear, and who were under no legal obligation to enter their appearance to the action. Therefore, if this principle and rule of construction be correct, Latham does not appear by the record to have been a party to the case legally before the Court, and against whom a valid judgment could have been given. Notwithstanding which, judgment was given against him and Woolford jointly, which is, in the opinion of this court, wholly unauthorized by law, and therefore ought to be, and is hereby, reversed, with costs, and the cause remanded to the Circuit Court of Pulaski county, from whence it came, for further proceedings to be there had according to law, and not inconsistent with this opinion. But, inasmuch as Latham has, according to the rule uniformly acted upon by this Court, made himself a party defendant to the action, by joining in the writ of error in this case, sued out and prosecuted in this Court, the case, upon its return to the Circuit Court, must be regarded and proceeded in, as though he had been duly and legally served with the original summons issued against him by the Justice of the Peace.

ABRAHAM BLOCK *against* JA'S H. WALKER.*ERROR to Hempstead Circuit Court.*

Under the territorial statute of assignments, an assignment was an agreement or contract in writing entered into between the assignee and assignor for a valuable consideration; and was equivalent to drawing a new bill in favor of the assignee on the original obligor.

After assignment and delivery, the assignee stood in precisely the same relation to the obligor, as the payee of a bill to the drawee, and thereby acquired the right of action, and was fully authorized to commence and prosecute suit on the bond in his own name.

After assignment once made, or become complete, the assignor had no power to release the debt, or any part of it.

The assignment being a contract, entered into by mutual consent of two persons, cannot, when properly executed, be revoked or dissolved, except by the like mutual consent of both. The contract cannot be cancelled, nor their respective rights seriously altered or destroyed, unless both parties agree to their alteration or destruction; and even then, that agreement must be made and evidenced according to the grade and dignity of the contract.

The assignor had no right to strike out and erase the assignment, after he had once executed it, and by delivery it became complete. He would have no right to alter or change the contract or assignment to the prejudice of the assignee or obligor, without their consent or agreement.

Nor can the assignee, after assignment in full and delivery to him, restore the legal interest in the bond to the assignor by the erasure or cancellation of the assignment. He may destroy the evidence of his own claim, but that will not re-instate the legal and equitable interest in the assignor, without any agreement, re-assignment, or re-delivery.

Where, therefore, to debt on bond, brought by A. for the use of B., the defendant pleaded, that before the commencement of the suit, A. made over, transferred, endorsed, and assigned the bond to B., and delivered the bond, so endorsed, to him, and thereby parted with and transferred all his right, title, and interest, of, in, and to the bond to B.; and defendant thereby came liable to pay to B., and that A. has no interest whatever in the suit, is a good plea in bar.

And a replication, that after the endorsement, B. caused the transfer and endorsement to be stricken out and erased, whereby the legal interest in the bond again vested in A., and A. became entitled to sue, is not good.

This was an action of debt, commenced by James H. Walker, for the use of Nicholas T. Perkins, against Abraham Block and William Simms, on a common money bond. The defendant, Block, pleaded that after the making of the bond, and before the commencement of the suit, to wit, &c., Walker made over, transferred, endorsed, and assigned all his right, title, claim, and interest, of, in, and to the bond, to Perkins, and delivered him the bond so endorsed, and by the endorsement and delivery directed the amount to be paid to Perkins; whereby he, Walker, parted with and transferred all his right, title, and interest, in and to the bond, to Perkins, and the defendant became

Abraham Block *against* Ja's H. Walker.

liable to pay to Perkins, and that Walker has no interest whatever in the suit.

To this plea the plaintiff replied, that after the transfer and assignment, Perkins caused said transfer and assignment to be stricken out and erased from the bond, by means whereof the legal interest in the bond was again vested in Walker, and Walker became entitled to sue.

To this replication the defendant, Block, demurred, and his demurrer being overruled, the plaintiff had judgment final against Block upon the demurrer, and Block sued his writ of error.

TRAPNALL & COCKE, for the plaintiff in error:

By the assignment, the legal interest in the note emanated from the assignor, and vested in the assignee, and afterwards the assignment becomes inoperative, and is important only as evidence of the transfer, and if lost may be supplied by parol. The only means by which the legal interest in an obligation can be transferred by the payee or obligee to any other person, is by an assignment under the statute; and after the assignment, all the right, title, and interest, of the payee is vested in the assignee. That interest can be re-conveyed by no other means; and, therefore, if the assignment is lost or obliterated, the written evidence of transfer may be destroyed, but the legal interest remains in the assignee, until assigned away by him; and, therefore, the replication was no sufficient answer to the plea, and the demurrer should have been sustained.

SCOTT, *contra*:

There is but one question for the court in this case, whether the striking out the transfer by Perkins re-vested the legal interest in said writing in Walker? Of this there can be no doubt. If a person who has endorsed a bill comes into possession of it again, he will be regarded as the bona fide holder and proprietor of the bill, and is entitled to recover, notwithstanding there may be on it one or more endorsements in full, subsequent to the one to him, without producing any receipt or endorsement back from either such endorsors, whose names he may strike from the bill at pleasure. *Bank of Ulica vs. Smith*, 18 J. R. 230. If, then, the assignor could strike out his own

Abraham Block *against* Ja's H. Walker.

assignment, so as to re-vest the legal title in himself, how much stronger is this case, when the striking out was by the assignee. In him was the legal right, and it was optional with him to have transferred that right, by endorsement, to a third person, or, by cancelling the assignment to himself, restore the note or writing to Walker; 15 *J. R.* 247, *Burdick vs. Green*, where it is decided that the legal title of an endorsee to a note may be divested, either by cancelling the endorsement, or by endorsing it again. If, then, the legal interest in the writing in controversy, was by the act of Perkins restored to Walker, it will not pretend to be argued that he could not bring this suit for the benefit of Perkins. Upon this head I need cite no authority—the books, both in England and this country, abound with similar cases. It has even been decided in New-York, that plaintiff may answer the plea of transfer, by stating that the suit was instituted for the benefit of assignee; 11 *Wendell* 27. The facts necessary to support this argument will be found in the replication, and are admitted by the demurrer. If I have not grossly mistaken the law and decisions on this subject, the court must affirm the judgment of the court below, giving to Walker the usual damages allowed by law, for the delay and trouble occasioned by this appeal.

In addition to the above, I would refer the court to 1st *Sumner* 478, *Riquet vs. Curtis*; *Dugan vs. the U. S.*, 3d *Wheaton* 172.

LACY, *Judge*, delivered the opinion of the Court:

The demurrer to the replication raises the only question presented by the assignment of errors, which is, was the legal interest in the writing obligatory, at the time of the institution of the suit, vested in the plaintiff in the action? The decision of this question involves the construction of our statute of assignments, and such general legal principles as are applicable to the case.

Anciently, at common law, *choses in action* were not assignable. They were first made so as respects foreign bills of exchange by the law merchant, and the payee not only had the right of transferring the legal as well as the equitable interest in such instruments by endorsement, but the endorsee was fully authorized to commence and prosecute the suit in his own name. Subsequently, by the statutes of

9th and 10th William III., and 3d and 4th Anne, inland bills of exchange and promissory notes were put on the same footing as foreign bills of exchange, and the law merchant declared to be applicable to them. The principles first introduced and established by the law merchant in regard to foreign bills of exchange, and afterwards extended and recognized by the acts above referred to, in relation to inland bills and promissory notes, doubtless give rise to most, if not to all the statutes of assignments of our own country. Our statute on the subject is very similar to that of Virginia and Kentucky, and is unlike the statute of Anne in every respect, except so far as it makes the legal as well as the equitable interest assignable, and authorizes the assignee to bring suit in his own name. In order that we may see its bearing on the question now before us, it is necessary to insert the act itself, and also such parts of the plea and replication, as necessarily fall within its provisions.

The statute declares, that all bonds, bills, and promissory notes, for money or property, shall be assignable, and the assignee may sue for them, in the same manner as the original holder thereof could do; and it shall and may be lawful for the person to whom said bonds, bills, or notes, are assignable, made over and endorsed, in his own name to commence and prosecute his action at law, for the recovery of the money mentioned in such bonds, bills, or notes, or so much thereof as shall appear to be due at the time of such assignment, in like manner as the person to whom the same was made payable might or could have done; and it shall not be in the power of the assignor, after assignment made as aforesaid, to release any part of the debt or sum really due by said bonds, bills, or notes, provided nothing in this section shall be so construed, as to change the nature of the defence in law that any defendant may have against the assignee, or the original assignor."

The plea alleges, that after the making of the said writing obligatory in the said declaration mentioned, and before the commencement of this suit, to wit: On the 26th day of December, A. D. 1839, in the county of Hempstead, as aforesaid, the said James H. Walker made over, transferred, endorsed, and assigned, all his right, title, claim, and interest to a certain Nicholas T. Perkins, by description of

N. T. Perkins, agent of D. Jeffries, guardian, &c., and then and there delivered the said writing obligatory, so endorsed and assigned, as aforesaid, to the said Nicholas T. Perkins. The defendant relies on these facts, in bar to the plaintiff's right of action, and the plea, after setting up our statute of assignments, as constituting a valid defence, concludes with a verification. The replication admits the facts as pleaded, but alleges new matter by way of avoidance; averring that the said Nicholas T. Perkins caused the said transfer and assignment to be stricken out and erased from said writing obligatory, by means of which said striking out and erasure of said transfer and endorsement by the said Nicholas T. Perkins, the legal interest in said writing obligatory was again reinstated in him, the said plaintiff, all of which he is ready to verify; and then it prays judgment for his debt, damages, and costs.

The demurrer to the replication in this case, raises the question, in whom was the legal interest vested at the time of the institution of this suit? The inquiry, then, is, did the erasure or cancellation by the assignee of the assignment from the writing obligatory, without delivery or a re-assignment to the assignor, vest in him the legal interest, and thereby authorize him to institute the suit in his own name? In examining this question, it should be borne in mind that the replication does not aver, that the assignor or obligor agreed to the erasure of the endorsement, or, that after the assignment was stricken out, that the writing obligatory was delivered or assigned to the original assignor. It merely alleges that the assignee caused the transfer and endorsement to be stricken out and erased from the writing obligatory, and by means of the striking out and erasure therefrom, the legal interest was again reinstated in the assignor. The truth or falsehood of this proposition we will now proceed to test; and in order to arrive at a correct conclusion on the subject, we shall have to analyze and determine the nature and character of assignable instruments, as fixed and ascertained by our statute. An assignment, then, according to our statute, is an agreement or contract in writing, entered into between the assignor and assignee, for a valuable consideration, is equivalent to drawing a new bill, in favor of the assignee, on the original obligor; and the assignee stands precisely in the same relation

to the obligor after assignment, as the assignor did before the transfer was made, the legal as well as equitable interest passed by assignment and delivery, and the assignee acquires the right of action thereby, and is fully authorized to commence and prosecute the suit in his own name. After the assignment is once made, or becomes completed, the assignor has no power to release the debt, or any part thereof. The latter clause of the section declares that "nothing shall be so construed in the statute, as to change the nature of the defence in law, that any defendant may have against the assignee or the original obligor." The statute is express and peremptory on these points, and it leaves no room for doubt or construction in regard to them. The assignment in the case now under consideration, is alleged in the plea to have been filled up before the commencement of the suit with the name of the assignee as well as the assignor's, and that by delivery, the writing obligatory was then passed into the hands of the assignee. This being the case, he necessarily, by the statute, possessed the right of action, and was entitled to the custody and safe-keeping of the writing obligatory, at the time the assignment was executed. The question then recurs, has he, since that time, rightly divested himself of these interests, and transferred them in a lawful manner to the assignor.

Admitting the assignment to be a contract, and that it is there can be no doubt, for all the authorities are full and conclusive on the point, the question is then, in what manner can the assignment be lawfully changed, cancelled, or revoked? See *Chitty on Bills*, 236, *Lamber vs. Oakes*, *Holt* 117; *Ballingalls vs. Gloster*, 3 *East* 483, *Starey vs. Barnes*, 7 *East*, 435. A contract is a mutual agreement of two or more, founded on a good or valuable consideration to do, or not to do, any particular thing. The agreement of two or more, competent to contract, being indispensably necessary to the formation of a valid contract, so it requires, likewise, their consent, when a contract is once properly executed, to revoke or dissolve it. In other words, the rights and obligations of each party to a contract being mutual and reciprocal, according to the terms and legal effect of their agreement, these respective rights and obligations can neither be seriously altered or destroyed, unless the party to whom they legally belong

shall agree to their alteration or destruction, and even in such a case, his agreement must properly be given, according to the grade and dignity of the contract.

These principles, it is believed, are fully warranted and sustained by all the authorities on the subject, and are every way consonant to reason and justice. The application of these plain and familiar principles to the question now before the court, will determine the rights and obligations of the respective parties, as fixed by the contract of assignment. It certainly cannot be contended that the assignor has a right to strike out and erase the assignment, after he has once executed it, and the delivery thereof becomes complete. After the assignment, he has no longer any control or power over the contract, because, by the assignment and delivery of the writing obligatory, all his interest is vested in the assignee, and he alone has the right of action in his own name; and the assignor cannot release any part of the debt due upon the bond, nor can he do any act that will change the nature of the defence that the obligor may have at law against himself, or against the assignee. Upon these points the Act is express and peremptory, and to allow him to do any thing injuriously affecting either the rights of the assignee or of the obligor, would be to permit him expressly to violate the provisions and intention of the statute. Independently of this, he would have no right or authority to alter or change the contract or assignment to the prejudice of the assignee or obligor, without their consent or agreement. These rights, whatever they may be, are vested by the assignment, and pass by the delivery of the writing obligatory, upon which the assignment is made, and being vested in them by the statute, they cannot be divested of them without an express and implied assignment on their part. It is then clearly manifest, that the assignor has no right to make any change or alteration in the contract whatever, so as to weaken or destroy the rights of the assignee or of the obligor. Neither has the obligor any right or authority to erase or strike out the assignment.—All the interest, both legal and equitable, is vested by the assignment in the assignee, and surely that interest or evidence, upon which it is founded, cannot be cancelled or obliterated without his consent. The only interest that the obligor has in the contract, is the guarantee that

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the nature of his defence at law, both against the assignee and assignor, shall not be changed. This the statute in express terms secures to him, and the law will not even allow any agreement between the assignee and assignor, materially to weaken or impair this guarantee. That these positions are true in relation to the assignor and the obligor, cannot be doubted, for the statute imposes the obligations above referred to upon them, and they are bound by its provisions.

We will now see what right the assignee has to strike out and erase the endorsement, without the consent or permission of the other parties to the contract.

There is a mutuality of obligation subsisting between the assignee, and assignor, and the obligor of the bond. Neither party can do any thing forbidden by the statute, or in violation of these contracts. If the assignment and delivery of the writing obligatory pass the legal as well as the equitable interest to the assignee, and that it does no one can deny, then how can that interest be again reinstated in him, without a subsequent assignment and delivery of the bond?

In this case, the plea shows that the endorsement was filled up before the commencement of the suit, and that the delivery of the bond was complete, all of which the replication admits to be true; and the doctrine is, "after an endorsement is full, the endorser can only transfer his interest in the bill or note by his own endorsement in writing." See *Chitty on Bills*, 253. An endorsement in full, says Chitty, contains in itself a complete regular and legal transfer of the interest in the bill to the person named in the endorsement; and even if the instrument should afterwards be left in the possession of the endorser, that would not invalidate the transfer. And, therefore, the allegation in the pleading, that a person endorsed a bill to another, sufficiently imports a transfer of the entire legal and beneficial interest, without any allegation of delivery. *Churchill vs. Gardner* 7 T. R. 596; *Smith vs. McClure*, 5 East 477. An endorsement of a bill once complete, by delivery over to the endorsee for value, is not revocable without his consent. "An endorsement, like an acceptance, may, before it has been delivered over to a bona fide holder, be revoked, afterwards it cannot, without his consent, and a re-assignment. *Cox*

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vs. *Troy* 5 B & A 474. It will be perceived that these principles are strictly applicable to bills of exchange, and if they are true in regard to them, they certainly will hold good as to assignable instruments under our statute, which do not vest by an endorsement in blank and delivery, but by being transferred, endorsed, and assigned over to the assignee. But it is contended that the endorser has come to the possession of the writing obligatory, and therefore he has a right to erase the endorsement, and re-invest the legal interest in himself. This, the court are not prepared to admit, for the record does not show he is in the lawful possession of the writing obligatory. The legal presumption is otherwise, for as the suit is brought for the use of the assignee, he is supposed to be in possession of the instrument. Besides, the replication admits such a state of fact as clearly prove that the legal interest at the time of the institution of the suit, was not vested in the assignor, and of course he was not the lawful holder or proprietor of the bond.

How, then, can it be said, that the assignee can restore the legal interest in the assignor, by the erasure or cancellation of the assignment? He may destroy the evidence of his own claim, but will that reinstate the legal and equitable interest in the assignor, without any agreement, re-assignment, or re-delivery? If that be the case, the the party of his own accord can not only destroy the mutual obligation of a subsisting contract, but he can at the same time create another, and that, too, without the agreement or consent of the other parties, and in prejudice of their rights. Such a proposition is surely as illegal as it is unjust, and can never receive countenance or support in any legal tribunal.

Again, what right or authority has the assignee, without the permission or consent of the obligor, to change the nature of his defence at law? None at all. This, the statute expressly forbids. The moment the assignment is made, the obligor's rights attach, and they certainly cannot be prejudiced or injured against his will.—Neither can his defence at law be so embarrassed or encumbered, as to make it less valuable or availing to him on the trial.

If this view of the question be correct, and that it is we have no doubt, then the legal interest at the time of the institution of the

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suit, was not vested in the assignor, and of course he has no right of action.

The decision of the court below, in overruling the demurrer, and giving judgment for the plaintiff, was therefore undoubtedly erroneous, and must be reversed with costs, and the cause remanded, to be proceeded in agreeably to the opinion here delivered.

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ERROR to Arkansas Circuit Court.

Where, to the transcript of the record sent up to the Supreme Court a paper is found appended, purporting to be a statement of the testimony given in the case, detailing the evidence, signed by the judge below, and marked filed by the clerk, it is no part of the record, and cannot be regarded in the Supreme Court.

Whatever proceedings or facts the law or the practice of the courts requires to be enrolled, constitute and form a part of the record—such as all judicial writs and process, the finding of the jury, the judgment of the court, and the like.

Whatever is not necessary to be enrolled, such as oral and written testimony, exceptions, &c., constitute no part of the record, unless they are expressly made so by order of the court, by agreement of parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict.

The statement of the evidence in this case, must be regarded as a mere loose paper on the files of the clerk, or the memorandum of the judge of his notes on the trial. If a party wishes to avail himself of any matter upon error, which does not necessarily appear of record, he must file exceptions at the trial, or request a special verdict.

Even if the statement of testimony in this case could be considered as a bill of exceptions, still it could not be considered in the Supreme Court, as it does not appear to have been taken during the trial, or upon any motion made in the court below.

Bills of exceptions are only allowable during the trial, and that they were then taken must appear on their face. If reduced to form, and signed, after the trial, it must appear that they were *taken* at the trial.

He who impeaches the judgment of an inferior court, is bound to show to the appellate tribunal in what the error consists, of which he complains. He must be able to lay his finger upon the error, and point it out, if he seeks to reverse or correct it.

And in the appellate court, every thing will be presumed in favor of the verdict, and the judgment of the court below, except what is affirmatively disproved by the record, or what the court is bound judicially to take notice of.

A verdict in detinue, finding the slaves in the declaration mentioned, to be the property of the plaintiff, affixing their value severally and respectively, finding their detention by the defendant, and awarding a certain amount of damages for the detention, is valid.

This was an action of detinue, commenced in the court below by Pike and wife and Smith and wife, against Lenox, for certain slaves. The declaration was in the usual form. The defendant pleaded the general issue, to which the plaintiff joined issue, and the case was tried by a jury. The jury found the slaves to be the property of the plaintiffs, found their values respectively, amounting in the aggregate to \$3,500, and \$2,710 for their hire.

Immediately after the entry of the judgment, in the transcript of the record, follows a bill of exceptions, stating simply, that defendant moved for a new trial, because the verdict was contrary to law and evidence, which motion was overruled by the court, to which defendant excepted.

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Then follows a paper, commencing in this way: "The following is the testimony on the part of the plaintiff," &c., detailing all the testimony, and concludes thus: "A copy of the record in this cause, as also the order of the court directing the sale which here insert. *E. L. Johnson, Judge. Filed October 12, 1838. Geo. W. Stokes, Clerk.*

As the case was decided on a preliminary point, it is unnecessary to state the facts of the case.

FREEMAN, ASHLEY, & WATKINS, for plaintiff in error:

Is the record in this case sufficient to raise a question of law? All objections to the return of the clerk to the writ of error, are waived by the argument and submission of the case to the court upon that record.

If, then, this case goes off, upon the merest technicality, and not upon its merits, upon the failure of the Judge below to incorporate the evidence upon a bill of exceptions, according to the *forms* of law, when such was evidently his intention, and when, by the law of the land, the plaintiffs below had no right to recover, it will be an outrage upon justice, and a scorn and reproach to the law.

See cases cited in the case of *Gray vs. Nations*, 1 *Ark. Rep.* 557, showing the right of certifying the evidence in the case.

The court will find upon reference to the assignment of errors, and the joinder thereto, that the testimony, as certified by the Judge below, is claimed by the one, and tacitly admitted by the other to be a part of the record. Otherwise, if the assignment of errors was so irregular as to allege error by means of a paper which was not a part of the record, the defendants here ought to have pleaded the assignment, or more properly moved to strike it off the files of the court. This they did not do. Since the defendants in error rely upon the technical objections, we pray the court to notice every feature in the case which will enable it to take cognizance, and do justice between the parties. What can be the object of requiring an assignment of errors, and a joinder thereto, if they do not bind and preclude the parties as other pleadings?

PIKE, contra:

This court is entirely uninformed as to the evidence given in the

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court below. No part of the evidence is legitimately before them, and they are absolutely prohibited by most positive and peremptory rules, from noticing the paper appended to the transcript, and purporting to be a statement of the evidence signed by the Judge. *It is no part of the record.*

The rule on this subject is thus laid down by an accurate writer on the subject. "Whatever the error be, and in whatever stage of the case it occur, *it must appear on the record*, in order that a writ of error may be sustained. And if the matter complained of do not necessarily appear on the record, the party contemplating a writ of error, should cause it to appear there, *by filing exceptions*, or requesting a special verdict." *Howe's Prac.* 465.

In *McFaddin v. Otis*, 6 *Mass.* 323, the defendants moved for a new trial, on the ground that the court had instructed the jury contrary to law, and at their request, the judge reported the evidence and his instructions. The motion for a new trial was overruled, and the defendant's counsel said he was instructed to remove the case into the Supreme Court of the United States by writ of error. Upon which, the Superior Court of Massachusetts said, that the report of the judge was not made a part of the record, and, as the nature of the defence was apparent only from the report, he could have no relief by error to the Supreme Court of the U. States; and, that, if he had contemplated a writ of error, he ought either to have filed a bill of exceptions, or requested a special verdict.

So in the case before the court there is merely a report of the evidence, signed by the judge, and found among the papers. It is nowhere even stated to have been prayed to be made a part of the record—the filing of it is not noted of record; and the case just quoted is as perfectly and conclusively in point, as any case could by possibility be.

So in *Coolidge v. Inglee*, 13 *Mass.* 50, the same court said, that the report of the judge is not a part of the record; nor are the reasons given for the final opinion of the court; nor the papers and documents filed in the case.

So in *Storer v. White*, 7 *Mass.* 418, the defendant was defaulted, and the plaintiff filed the note declared on, as evidence of damages.

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The error assigned was variance between the note and declaration; and the court said, in the case before us, there appears to be no error on the record. For although such a note as is described in the assignment of errors was filed in the case, yet we cannot take notice of it as a part of the record, any more than we could of a deposition, or other piece of evidence filed."

Pierce v. Adams, 8 *Mass.* 383, was a case of the same kind, and the court there said, "It cannot appear to us that the note, a copy of which is sent up with the record, was the note on which the action was brought. But at any rate, it was merely evidence, and the defendant should have objected to its admission at the trial. If his objection had been overruled, he should have filed his bill of exceptions, and there would then have been matter on record to support his writ of error."

In this case the court finds among the papers an informal statement of the testimony in the case, which appears to be *signed, but not sealed* by the judge, which is not noticed on record, nor incorporated in a bill of exceptions; but was simply marked filed on the 12th of October, after the trial of the cause, and after the motion for a new trial was overruled. And the presumption therefore is, that it was a mere memorandum taken by the judge for his own private use, and inadvertently left among the papers. Most clearly is it no part of the record, and even were it a bill of exceptions, it would be excluded under the rule laid down in *Pope v. Evans*, and *Gray v. Nations*, by this court; for, in the very words of this court in the latter case, if exceptions, "it does not appear that they were taken during the trial or upon any motion made" in the court below.

"There are five legitimate methods by which matters of fact may be spread on the record. By *consent of parties—by special verdict—by oyer—by bill of exceptions—and by demurrer to evidence—and there is no other method.*" *Cole v. Driskell*, 1 *Blackf.* 16; *Dougherty v. Campbell*, *ib.* 40. See also *Gist v. Higgins*, 1 *Bibb*, 304.

In *Goldsbury v. May*, 1 *Litt.* 254, the court said: "There appear numerous instructions to the jury in the cause, *signed by the Judge* and copied by the clerk. To some of them the word "given," and to others the word "refused," is annexed. But none of these, except

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one, is made part of an exception, or is otherwise connected with the record. *Although there may be numerous loose papers in a cause, signed by the Judge, and the clerk shall incorporate them improperly into the copy which he makes out for this court, we cannot notice them as a part of the record, unless they have been made part of it by exceptions or order of the court below.*" And see *Ashby v. Sharp*, 1 *Litt.* 166. *Patton v. Kennedy*, 1 *Marsh.* 389.

So in *Garland v. Bugg*, 1 *Hcn. & Mun.* 376, it was decided that an affidavit for continuance was no part of the record, unless made so by exception. And see *Pendleton v. U. States*, 2 *Brock.* 75, that no fact not stated in a bill of exceptions will be noticed, on error. See also *Butcher v. Reil*, 1 *Mo. Rep.* 262; *Davis v. Burns*, *ib.* 261; and *Davis v. Hays*, *ib.* 270.

So in *Reid v. Rensselaer Glass Factory*, 3 *Cowen* 387, by *Foot arg.* it is laid down that there are but three ways of getting the facts upon the record. These are, by demurrer to evidence, bill of exceptions, or special verdict; and though the court of errors agreed that a history of the case might be brought up differently in New-York under their statute authorizing references, yet the whole court admitted that according to the English law the position of *Foot* was correct. See 5 *Cowen* 592. SPENCER, *Senator*, said, that "a case settled before a judge, in an ordinary trial at law, forms no part of the record of judgment, and is not brought up by a writ of error." *ib.* 605. And see *Lanuse v. Barker*, 10 *J. R.* 312.

And see upon this point, *Caldwell v. Richards*, 2 *Bibb* 331; *Marshall v. Reid*, 1 *Bibb* 327; *Hardin* 507; *Fennie v. Martin*, 1 *Bibb* 41; *McLain v. Lillard*, 1 *Bibb* 146; *Adams v. Macey*, 1 *Bibb* 328; 3 *Marsh* 431; *Faulkner v. Wilcox*, 2 *Lit.* 370.

A bill of exceptions must appear *on its face*, to have been taken and signed at the trial of the cause. If afterwards reduced to form and signed, it must be signed *nunc pro tunc*, so as to appear to have been taken and signed during the trial. *Law v. Merrills*, 6 *Wend.* 278; *Walton v. U. States*, 9 *Wheat.* 651; *Ex parte Bradstreet*, 4 *Peters* 107; *Shepherd v. White*, 3 *Cowen* 32.

Will a bill of exceptions or writ of error lie for refusing a new trial? See *Law v. Merrills*, 6 *Wend.* 278; *Henderson v. Moore*, 2 *Cond.*

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Rep. 172; *Mar. Ins. Co. v. Young*, *ib.* 227; *Blunt v. Smith*, 7 *Wheat.* 272; 4 *Wheat.* 220; 2 *Day* 368; 1 *Conn.* 49; 6 *Conn.* 59; 2 *Binney* 93; *Burke v. Young*, 2 *Serg. & R.* 383; 1 *Littell Rep.* 305, *Outen v. Merrill*.

LACY, Judge, delivered the opinion of the Court:

In inspecting the transcript of the record sent up to this court, we find a paper appended to it, which purports to be a statement of the testimony given on the part of the plaintiffs in the case of Albert Pike and wife and O. H. Smith and wife, against John H. Lennox, in an action of detainue.

This statement details the evidence of Terrence Farrelly and Frederick Notrebe, and is signed by E. L. Johnson, Judge, and is marked filed October 12th, 1838, G. W. Stokes, Clerk.

The assignment of errors questions the correctness of the opinion of the court below, in overruling the defendant's motion for a new trial, and in rendering judgment in favor of the plaintiffs. Before we proceed to examine and discuss the question raised by the assignment of errors, it becomes necessary to determine whether the paper purporting to be a statement of the testimony in the case, signed by the judge and marked filed by the clerk, constitutes a part of the record or not.

In disposing of this preliminary question, we will consider in the first place what constitutes a court, and what a judicial record. A court is defined to be a place where justice is judicially administered. In all courts or judicial tribunals, the sovereign power of the government in contemplation of law, is always presumed to be present, and that sovereignty is represented by the judges, or other properly constituted legal officers, whose authority is only an emanation of the sovereign will. 3 *Blackstone Commentaries* 24, *Co. Litt.* 260. A court of record is where the acts and judicial proceedings are enrolled in parchment or on paper for a particular memorial and testimony, which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled maxim, that nothing shall be averred against a record, nor shall any plea or proof be admitted to contradict it. If the existence of the record be doubted or denied, that fact shall be tried by nothing

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but the record itself, that is upon bare inspection whether there be any such record or no, else there would be no end of disputes. 2 *Tidd* 850; *Starkie on Evidence* 72.

Whatever proceedings or facts the law or the practice of the courts requires to be enrolled, constitute and form a part of the record. Such, for instance, are all judicial writs and process, finding of the jury, and the judgment of the court, and the like. Whatever else that is not necessary enrolled, such, for example, as oral and written testimony, and exceptions taken to the opinion and judgment of the court, constitutes no part of the record, unless they are expressly made so by order of the court, by the agreement of the parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict. These are the usual and only legitimate modes by which matters of fact may be spread upon the record. *Cole v. Driskell*, 1st *Blackf.* 16; *Gist v. Higgins*, 1st *Bibb* 304.

The question then is, does the paper found among the files of the clerk, which purports to detail the evidence in the cause, and which is signed by the judge, constitute any part of the roll or record of the court? It certainly does not, for being merely a statement of testimony, it is never regarded by law, or the practice of the courts, to be necessarily enrolled. There is no order of the court directing it to be spread upon the record, nor is there any agreement of the parties placing it there; and surely it cannot be pretended that it is put upon the rolls, by oyer, special verdict, demurrer to evidence, or bill of exception; then it can only be regarded as a mere loose paper on the files of the clerk, or the memorandum of the judge of his notes on trial. It is appended to the transcript of the record sent up, and immediately follows the bill of exceptions that was taken upon the trial, and which by express order of the court was made part of the record. It is signed, not sealed, by the judge, and whether it contains all or any part of the testimony given on the trial, we cannot judicially know; for being no part of the record, we are not authorized to look into it, nor can a writ of error reach it. If a party wishes to avail himself of any matter upon error that does not necessarily appear of record, he must file exceptions at the trial, or request a special verdict. In *McFaddin and others v. Otis*, 6 *Mass.* 323, the defendant moved

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for a new trial, upon the ground of the instructions of the court being against law, and requested the judge to report the evidence and the instructions. The report was made, and after an opinion was intimated against the new trial by the Supreme Court of Massachusetts, the counsel for the defendant stated that the defence rested upon the embargo laws passed by Congress, as appears by the Judge's report; and he was instructed if judgment against his client, to move the cause by writ of error into the Supreme Court of the United States.

It was then observed to him by the court, that the report of the judge was not made part of the record, and as the defence was only apparent from the report of the judge, he could have no relief by error to the Supreme Court of the United States; and that if he had contemplated a writ of error, he ought to have filed a bill of exceptions, or requested a special verdict. The rule here laid down is conclusive upon the point now before the court, and the case in which it was stated is every way stronger than the one now under consideration. In the case above referred to, the report contained the defence and the instructions of the judges, and still it was held that the report is part of the record.

There is only a loose memorandum of a judge containing the notes of the testimony, and nothing more. In the case of *Coolidge v. Inglee*, 13 *Mass.* 50, the court held this language: "The report of the judge is not a part of the record, nor are reasons given for the final opinion of the court, nor the papers or documents filed in the case." In no possible aspect, then, can this statement of the testimony be considered as any part of the record; but even admitting it to be a bill of exceptions, which it certainly is not, still it would be excluded from our consideration, for it does not appear to have been taken during the trial, or upon any motion made in the court below. The object of a bill of exceptions is two-fold. First, it is to object to the opinion of the court on some point of law, and refers generally to the competency of witnesses, the admissibility of evidence, or the legal effect of it, and the like; and secondly, it is to reduce to writing and incorporate on the record, the substance of the transaction on which the opinion of the court is found, so that the court alone, when called on to revise the decision given, may be able to see and correct the error, if any

exists. In *Evans vs. Pope*, and *Gray vs. Nations*, it was decided by this court that bills of exceptions were only allowable during the trial, and that facts must appear on the face of the exceptions, if afterwards they are reduced to form and signed. They must appear to have been taken and signed at the trial. *Law vs. Merrills*, 6 Wend. 278; *Wallon vs. U. States*, 9 Wheat. 651; *Exparte Bradshaw*, 4 Peters 107; 2 *Tidd. Practice*, 912.

The bill of exceptions which is made part of the record, calls in question the opinion of the court below, in refusing to set aside the verdict, and in not awarding a new trial. It is contended on behalf of the plaintiffs in error, that the Circuit Court erred in overruling the motion for a new trial, as the verdict and judgment on the case was contrary to law and evidence. It is a well settled principle, and one fully established by all the authorities, that he who impeaches the judgment of an inferior court, is bound to show to a superior tribunal in what the error consists of which he complains. He must be able to lay his finger upon the error, and point it out, if he seeks to review or correct it.

The reason of the rule rests alone upon the presumption, that the judgment below was right; and that presumption is strengthened and fortified by the universally admitted principle in all correct reasoning, that he who holds the affirmative of any proposition, is bound to prove it.

Hence it has been so repeatedly ruled in this court, that every thing will be presumed in favor of the verdict and judgment of the court below, except what is affirmatively disproved by the record, or what this court is bound judicially to take notice of.

By applying this principle to the case now under consideration, we will readily perceive how the matter stands. There is but one bill of exceptions filed in the case, and that contains no part of the evidence adduced upon the trial; neither does the record disclose in any part of it, what testimony was given or refused upon the hearing of the cause. It is wholly impossible, then, for this court to know how or in what manner the plaintiffs claimed title to the property in question, or what was the nature and character of the defence set up in bar of their right of recovery. Both the record and bill of exceptions

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being wholly silent on these points. We are then necessarily compelled to resort to the legal presumptions that arise in the case, and which, of course, are binding and conclusive upon this court. We are then bound to presume, that the plaintiffs established their right to the property in dispute, by competent and satisfactory evidence, or the jury would not have rendered a verdict in their favor. Without such proof, the jury had no right to find a verdict against the defendants, or the court to pronounce judgment upon their finding; whether the facts or circumstances of the case did in reality warrant the jury in coming to such conclusion, we have no means of knowing, but that is the legal presumption, which, in the absence of all opposing or contradictory testimony on the subject, we are bound to respect and obey. The presumption stands in lieu of full and conclusive proof on the point, and in legal contemplation, is in every way equal to it. The declaration in this case is correctly drawn, and contains on its face a good cause of action; the plea and joinder are regularly filed and every way sufficient, and make up a valid issue between the parties; the verdict is a response to that issue, and is strictly formal, perfectly legal.

It finds the slaves in the declaration mentioned, to be the property of the plaintiffs, and it affixes their value severally and respectively. It also finds their detention by the defendants, and awards a certain amount of damages for the same. No valid objection then can be taken to the finding of the jury, for their verdict is in accordance with the most approved forms and precedents in such cases. 11 Co. 109; *Cornwell vs. Truss*, 2 *Munf.* 195; *Gordon vs. Harper*, 7 *T. R.* 9; 2d *Starkie on Evidence*, 288, 9. The only remaining question now to be decided is, was the judgment in the court below rightfully given in favor of the plaintiffs, or properly pronounced on the verdict? That it was, is perfectly manifest from an inspection of the judgment itself. After the *eois consideratum* is recited by the court, judgment proceeds to declare that the plaintiffs do have and recover of the defendants, severally and respectively, the slaves in the declaration mentioned, if they are to be had, or if they or any of them are not to be had, then it awards the value of each slave separately, as ascertained and fixed by the jury. It further declares, that the plaintiffs do have and

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recover of the defendant, the amount of damages as found by the jury, and that sum is set forth in the judgment for the detention and hire of the slaves while they were in the possession of the defendant, together with the costs of suit. The judgment in every particular follows the verdict, and corresponds with it. The writ of error sued out, denies the validity of this judgment. It is certainly valid and regular on its face. In what then does its illegality consist? It is pronounced upon a valid and regular verdict, presumed to be given on full and competent proof, and every way satisfactory to the minds of the jury who rendered it.

This is an action of detinue, where the plaintiffs sue for the recovery of the particular thing demanded, and the judgment in such form of actions must be in the alternative, and is given for the recovery of each particular item of property mentioned in the declaration, if to be had, or if not to be had, then it is rendered for the respective value of each article separately. It is usual for the jury to give damages for the detention of the property, and in such a case the judgment should pursue the finding, and award the damages assessed by the jury, with the costs of this. In the present instance, the judgment is in strict conformity with the rules just stated, and that being the case, it is fully sustained by all the authorities. *Higginbotham vs. Rucker*, 2 Call 313.

As it has been already shown that the legal presumptions are all in favor of the verdict and judgment of the court below; and as these presumptions stand unopposed and uncontradicted by any part of the record, it necessarily follows that there is no error in the opinions and judgment of the Circuit Court, now brought up for revision and correction. It may be, and probably is true, that the defendant had a good and lawful defence to the action. But, then, if he had, he has lost the benefit of that right by his own lashes, or that of his counsel. There is but one bill of exceptions taken during the trial, and that wholly fails to spread any part of the testimony on the record. It was unquestionably the duty of the defendant's counsel, in excepting to the opinion of the court in overruling his motion for a new trial, to have incorporated into the record all the testimony given in the cause, so that this court could have seen whether there was error or not in the decision and judgment of the Circuit Court.

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If, in omitting to do this, the defendant's rights have been prejudiced and injured, the fault rests with himself and his counsel, and this court is not authorized, by bare possibility or conjecture, to supply any omission or mistake.

The legal consequence, then, attaches in favor of the verdict and judgment of the court below, and is decisive of the question. This being the case, it necessarily follows that the judgment of the Circuit Court must be affirmed, with costs.

*Rose against Ford and others.**APPEAL from Chicot Circuit Court.*

A sheriff's return on a writ of summons, in the following words: "Executed the within by reading, April 8th, 1839," is not sufficient to sustain a judgment by default.

The law presumes that every public officer will perform his official duties according to law; and if the facts stated by the sheriff in his return, show a legal service, the truth of the return cannot, as a general rule, be collaterally questioned by the parties to the proceedings.

But where the return, admitting all the facts stated in it to be true, essentially fails to show a valid legal service, the court can not supply the omission.

After judgment, amendments in the return of service can only be made in matters of form.

The defendant, by appearing generally, waives all exceptions to the writ or return, or at least is precluded thereby from taking any advantage of them.

But he has no legal right to *appear to*, or *defend* the action, after judgment rendered against him. He then has no day in court.

Praying an appeal, therefore, is no such appearance as waives any objection to the writ or return.

An appeal may be taken by the defendant, under our statute, after a judgment by default, without first applying to the court to set aside the judgment.

Where a writ issued under the Territorial statute, but the revised statutes went into force before it was served, the sheriff was to be governed by the latter, as to the service and return.

Where the writ and declaration went out together, it was necessary to be shown in the return that the writ was read to the defendant, and that it was read to him in the proper county.

The rule in *Gilbreath v. Kuykendall* renewed.

This was an action of debt, commenced by Ford & Co. against Rose. The return on the original writ was in the following words: "Executed the within by reading, April 8th, 1839. *W. G., Sheriff, by T. H. R., Deputy.*" The defendant did not appear, and judgment was rendered by default, on the 21st of May, 1839. On the 22d, the defendant filed his affidavit and prayer for an appeal. On the motion book, immediately after the motion of the prayer of appeal, entered the same day, was a motion to amend the sheriff's return in the case. On the 24th the court revoked the leave to amend the return, and granted the appeal.

CUMMINS & PIKE, for the appellant:

The service of the writ was not sufficient to authorize a judgment by default. See *Gilbreath v. Kuykendall*, *ante* p. 50.

After an appeal was prayed, the sheriff's return could not be amend-

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ed in matter of substance. The statute only authorizes amendments of returns in matter of form, after judgment rendered. *Rev. St. p. 635, sec. 116.* Here the motion was general, to amend except in the return day. The motion therefore was properly refused.

The bill of exceptions was filed after appeal was granted, and according to the rule established in *Lyon v. Evans et al.*, 1 Ark. 349, and *Gray et al. v. Nations*, *ib.* 557, will not be noticed.

If it could, still the record states that the prayer of appeal was made before the motion to amend, and the record must prevail. *Lyon v. Evans et al.*, 1 Ark. 349.

SUTTON & FOWLER, contra:

The defendant below did not, upon *cause shown*, move the court to set aside the judgment, and permit him to defend, as the court would no doubt have allowed him to do. On the other hand, he prayed an appeal from a judgment regularly rendered for the amount designated in the note. If he had a defence, or if injustice were done him by the judgment, it was in his power to correct it in the court below, simply by showing that he *had a defence*. This he never attempted to do, therefore complaint comes from him with peculiarly bad grace, and he should not receive the countenance of this court, without showing palpable error in law.

As to the first error assigned, it is respectfully urged that the sheriff's return, as first made, was sufficient upon which to render a judgment. A reading to the defendant is good service. *New Code, p. 621, sec. 13.* The presumption of law is in favor of the return—certainty to a common intent only being required. And as there was but *the one* defendant named in the summons, the conclusion forces itself irresistibly upon us, that if "executed" at all, and the sheriff returns that fact in this case, it must have been "*ex necessitate rei*" *executed upon the defendant*. Otherwise, it was not executed at all, and this position at once would put in issue the truth of the sheriff's return, which stands always as true, until the contrary is proved. But suppose, for a moment, that the return is defective. Is not our statute of *jeofails* broad enough to cover far more glaring defects? Sheriff's returns may be amended both before and *after* judgment. *New Code, p. 635, sec.*

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116. See also *ib.*, sec. 114, *et seq.*, for amendments generally. The court below having given appellees leave to amend the return, it must from that moment be considered as amended, and made a full and formal return, and no order rescinding such leave could prejudice rights acquired thereunder by the appellees.

Rose was precluded from an appeal, not having moved as he had a right and was bound to do, to set aside said judgment, &c. His appeal is captious and unnecessary. He could have relieved himself in the court below by motion. Rose coming in during term, cured defects in *service*, &c.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The only question presented by the record and assignment, which it becomes our duty to consider, is this: Is the service of the process on Rose, as set forth in the return thereof by the sheriff, endorsed on the writ, sufficient in law to authorize and uphold the judgment by default given against him by the Circuit Court?

The solution of this question depends upon the construction to be given to the thirteenth, fourteenth, and fifteenth sections, of the CXVI. Chap. of the Revised Statutes of Arkansas, 'pages 621, 622, which provide "that a summons may be executed either by reading the writ to the defendant, or by delivering him a copy thereof, or by leaving a copy thereof at his usual place of abode, with some white person of the family over 15 years of age.

"And in all such cases where the defendant shall refuse to hear such writ read, or to receive a copy thereof, the offer of the officer to read the same, or to deliver a copy thereof, shall be a sufficient service of the writ; and every officer to whom any writ shall be delivered to be executed, shall endorse thereon the time when such writ came to his hands, and shall make return thereof, in writing, and shall sign his name to such return, and set out how or in what manner he executed the same."

The appellees insist that the presumption of law is in favor of the return. That certainty to a common intent only is regarded, and there being but one defendant named in the writ, the conclusion is irresistible, that it was "executed," and the sheriff states that fact in

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his return; and if executed, it must *ex necessitate rei* have been executed on the defendant. Otherwise it could not have been executed at all; which last position is inadmissible, because it controverts the truth of the fact stated in the return, which is always taken as true until the contrary is proved; that the defect in the return, if any, was cured by the appearance of Rose, or the statute of jeofails, and was subject to amendment either before or after judgment; and that an appeal from a judgment by default, cannot be taken by the defendant, until he has applied to the court to set aside the judgment, and his application has been overruled or denied.

The law certainly presumes, that every public officer will perform his official duties according to law; and if the facts stated by the sheriff in his return of process show a legal service, as a general rule their truth cannot collaterally be questioned by the parties to the proceedings; but when the return, admitting all the facts stated in it to be true, essentially fails to show a valid legal service, we are not aware of the existence of any principle of law, or rule of practice, by which the court could be justified in presuming their existence, or supplying the omission. It is, also, as a general rule, admitted, that an officer may, by leave of the court, amend his return in form or substance, either before or after judgment, subject, however, at this time, to the important limitation of this right imposed by the 115th and 116th sections of the statute above referred to, *Revised Statutes, Arkansas, page 635*, which, in our apprehension, limits the right, when the amendment is made after judgment, to matters of form. And there can be no doubt that the defendant, by appearing to the action, generally waives all exceptions to the writ, and the service of the writ; or at least he is precluded thereby from taking any advantage of either.

But he has no legal right to appear to or defend the action, after final judgment is given against him; for so long as it remains in force, he is bound by it, and his rights involved in the controversy are considered as determined. He has, in legal parlance, "no day in court;" and this was the situation of Rose, when he prayed the appeal in this case, which is now urged as an appearance, by which he is concluded from taking advantage of any defect in the service or return of the writ. We cannot, therefore, consider the prayer for an appeal as

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equivalent to an appearance, or regard him as having appeared to the action, so as to preclude him from the benefit of any legal objection to the return of the sheriff. The proposition stated and relied on by the defendants in error, that no appeal will lie in favor of the defendant from a judgment by default, until he has applied to the court to set aside the judgment, and failed in his application, is, in our opinion, equally untenable. By the 141st section of the statute before cited, *Rev. Statutes, Ark.*, 638, it is enacted, "that the party aggrieved by any final judgment or decision of any Circuit Court in any civil case, may make his appeal to the Supreme Court." Other sections of the same statute prescribe the time within which the appeal shall be prayed, and define the conditions upon which it shall be granted, all of which appear to have been observed and strictly complied with by Rose; and we do not perceive how it is possible that the provisions of the seventy-seventh section of the same Act, which authorizes the court to set aside the judgment, for good cause shown, at any time before the damages shall be assessed, and on such terms as may be just—or of the eightieth section, which provides, that whenever an interlocutory judgment shall be rendered for the plaintiff by default, or upon demurrer in any suit founded on any instrument in writing, and the demand is ascertained by such instrument, the court shall assess the damages, and final judgment shall be given thereon, cannot be considered as imposing any restriction upon the right of appeal, as given by the 141st section. One of them may, and probably does, enlarge the rights of the defendant, against whom judgment by default is given, while the other simply dispenses with the necessity of empannelling a jury, to inquire of damages in such cases as are embraced by its provisions, and authorizes the court to assess the damages, and give final judgment therefor; but surely neither can have any effect upon the right of appeal.

It is a principle alike essential to the preservation and security of private rights and civil liberty, that no valid judgment can be given, until the defendant or person to be bound thereby has appeared to the proceeding, or had actual or constructive notice thereof, and an opportunity of being heard in defence of his rights; and according to this principle, enforced by the provisions of the statute first quoted,

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no judgment by default can be justified, or legally given, until it appears affirmatively by the record, or other competent legal proof, that the defendant has had actual or constructive notice of the proceeding, and failed to appear in obedience thereto; then, and not otherwise, the law considers him as making default by not appearing to answer to or defend against the charge preferred against him, and justifies an adjudication upon his rights without his presence.

Having thus presented the principles and rules by which the validity of the judgment given in this case must be determined, and stated and disposed of several propositions presented and relied on by the appellees, we will now proceed to test the return before us, by those principles and provisions of law, and determine upon its sufficiency.

The return states, that the process was executed by reading, but omits to state what was read, or to whom or at what place. The writ bears date on the 18th day of March, and the return on the 8th of April, 1839. At the date of the former, the law required the writ to be endorsed on the declaration, and that the writ and declaration should go out and be served together; and the reading or delivery of a copy to the defendant of either without the other, would not have been a sufficient service; but at the date of the return, the provisions quoted above were in force, and constituted the rule by which the officer should have acted and been governed, in the execution of the writ. And another section of the same statute provides, that the declaration shall not accompany the writ, or be served therewith. But it is evident that the declaration and writ in this case were both in the hands of the sheriff. Did he read the declaration or the writ, or did he read both of them to the defendant? Did he read them or either of them to the defendant in the county of Chicot? Does the return show satisfactorily, or with sufficient certainty, how the writ was executed, "to justify" the conclusion that it was executed according to law? We think it does not. The sheriff was expressly required by law, to state in his return how, or in what manner, he executed the writ. This he has attempted to do, and we are to presume that he has set forth in his return, as many of the facts, necessary to show a valid service, as he could consistently with the truth. Yet he, contrary to the express

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direction of the statute, and in direct violation of his duty, if in fact the writ was executed by him according to law, has entirely omitted to state what he did read, and to show by reasonable intendment, that he read the writ to the defendant in Chicot county. These facts are material, and they, or something equivalent to them, must appear by the return, to authorize a judgment by default for the non-appearance of the defendant. But every fact stated in this return may be literally true, and the sheriff or his deputy never have read the writ to the defendant, or, if read to him, it may not have been in Chicot county; and, in either event, there would not have been a legal service. Under these circumstances, the law did not, in our opinion, justify any adjudication upon the rights of Rose, without his appearance. And, therefore, the judgment in this case given against him by the Circuit Court of Chicot county, ought to be, and is, hereby, reversed, annulled, and set aside, with costs, and the case remanded to said Circuit Court, for further proceedings to be there had according to law, and not inconsistent with this opinion, and according to the rule established and uniformly acted upon by this court. The case, when returned to the Circuit Court, must be considered and proceeded in, as though Rose had been legally served with a valid writ, more than thirty days previous to the term of the court to which the case may be regularly returned, he having voluntarily made himself a party thereto, by prosecuting his appeal to this court.

*BURRIS against WISE & HIND.**APPEAL from Phillips Circuit Court.*

If, after his motion to quash the writ is overruled, the defendant appears and pleads to the action, he waives all defects in the writ, if any existed.

Where, at Dec. Term, 1838, a cause was continued on account of the absence of A. and B., two of defendant's witnesses; and at May Term, 1839, another affidavit for continuance is filed by him on account of the absence of A., one of the same witnesses, a continuance cannot be granted, because no suit can be twice continued for the same cause.

Every affidavit for a continuance must state that the party has reason to believe that he can procure the attendance of the witnesses by the next term of the court, or that their testimony can be procured by that time.

In an affidavit for continuance under our statute, it is sufficient to state, that the party expects to prove by the witnesses who are absent, the facts stated in his affidavit.

The party who, in applying for a continuance, seeks to free himself from the presumption of culpable negligence, is bound to show such a state of facts or circumstances, as will prove that he has used due diligence to obtain the testimony, or as will take his case out of the legal inference which stands against him.

Where the affidavit states that the defendant had leave to take depositions at the last term of the court, but could not avail himself of that leave, in consequence of the witness having left his former place of abode, at the time when deft. intended to have procured his deposition, to a remote part of an adjoining county; which location the deft. was not apprized of until within the last two or three weeks, when it would have been impossible for him to have procured his deposition in time to be read, and the record shows that he did not apply to take the deposition until two or three weeks prior to the trial, the court acts rightly in refusing a continuance.

In failing to apply to take the deposition before, the deft. must be considered guilty of culpable negligence, as he shows no excuse for such failure; and he should also have shown that he had diligently searched for and inquired after the residence of the witness, and could not possibly find out where he resided, nor could he by any practicable means in his power procure his testimony.

Should the Circuit Court, in the exercise of their discretion as to granting or refusing continuances, capriciously or arbitrarily sport away important rights belonging to either party, their decisions and judgments would be examined in the Supreme Court, and be liable to be corrected on appeal or writ of error.

But this court would not reverse a decision or judgment below, for merely granting or refusing a continuance, unless it clearly and positively appears, from the face of the record, that the court below were guilty of palpable and manifest violation of public duty, seriously prejudging the rights of the party complaining.

In order to entitle a party to a new trial, on the ground of newly discovered evidence, the affidavit in the case must show:

First, the names of witnesses whose testimony has been discovered, and the facts expected to be established by them;

Second, facts and circumstances sufficient to prove that the applicant has used due diligence in preparing his case for trial;

Third, that the facts and circumstances newly discovered, have come to his knowledge since the trial, and are such, as, if adduced on the trial, would have been competent to prove the issue, and would probably have changed the verdict; and

Fourth, that the evidence discovered is not cumulative of that previously relied on, and will tend to prove material facts, which were not put directly in issue on the trial.

The affidavit must show affirmatively, that the newly discovered evidence is not cumulative.

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Where no part of the evidence is spread upon the record, and the affidavits of persons filed in support of the motion for a new trial set down the prices of the carpenters' work and labor done, for which suit was brought, at much lower rates than they are charged in the plaintiff's bill, but fail to show that the persons making the affidavits were carpenters by trade, or judges of the prices of such work and labor, they are insufficient.

If this testimony had been adduced on the trial, it might have been disproved by the evidence in the case. This is the legal inference following the verdict and judgment; and the appellant cannot escape from it, unless he shows affirmatively, by spreading the whole testimony upon the record, that such would not have been the fact.

This was an action of assumpsit, commenced by *Wise and Hind*, who were mechanics, and partners as carpenters, against *Burriss*, upon the common counts for work and labor.

At the return term, the defendant moved to quash the writ, which motion was overruled, and he excepted, and then pleaded non assumpsit, to which issue was joined. On defendant's motion and affidavit, the case was then continued on account of the absence of *James F. Ellis* and *James Wise*, two material witnesses.

At May term, 1839, *Burriss* again moved to continue the case, on his affidavit, stating that *James F. Ellis*, a material witness in his behalf, and who had been duly subpoenaed, was absent, by whom, if present, he expected to prove an offset of \$200, and was the only witness known to him by whom the same facts could be established; that although he had leave at Nov. term, 1838, to take depositions generally, he could not avail himself of that leave, in consequence of said *Ellis* having left his former place of residence at the time he intended to have procured his deposition, to a remote part of Arkansas county, which location he was not apprized of, until within two or three weeks before the trial, when it would have been impossible to procure his deposition in time, and that the continuance was not asked for delay, &c.

The motion for a continuance was overruled, to which *Burriss* excepted. A jury was then called, and verdict returned and judgment rendered for \$481, 30 cents damages.

The defendant then filed his motion, sworn to, for a new trial, on the grounds: *first*, that he was not able to adduce the testimony stated in his affidavit for continuance; *second*, that he had discovered important evidence, of which he was unapprized before or at the trial, which would diminish the plaintiff's claim about \$200, and that he had used due diligence to obtain all the evidence in his favor; and

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third, that the verdict was exorbitant, unreasonable, and unsupported by the facts or justice of the case.

Connected with this is the affidavit of two persons, of their measurement and estimate of the work done by the plaintiffs for the defendant, by which the amount of the work is estimated at \$441 37. The bill of *Hind & Wise*, for the same work, as filed, \$648 30.

The court overruled the motion for a new trial, and *Burris* appealed.

CUMMINS & PIKE for appellant:

The first question in this case is, whether the affidavit for continuance is sufficient, and whether, when it was made, a continuance should not have been granted.

That it was sufficient, there can be but little doubt. It states that a material witness is absent, and gives his name—that he has been duly subpoenaed in the cause—that if present he would prove an offset against the plaintiff's demand to the sum of two hundred dollars—that he is the only witness known to the defendant by whom the same facts can be established—that the defendant had not taken his deposition, because he had removed to a remote part of another county—and the defendant did not know his location until within two or three weeks before the trial, when it would have been impossible to have procured his deposition in time; and that the continuance is not asked for delay, &c.

If the affidavit was sufficient, it was clearly error to refuse a continuance; and the error is not cured by the defendant's appearing and contesting the case at the trial. See to both these points, *Hooker v. Rogers*, 6 *Cowen* 577.

No doubt the court below had a discretion as to granting a continuance, according to the rule laid down in *Rex v. D'Eon*, 3d *Burr* 1514; 1 *W. Bla.* 514 S. C.; but it is not an arbitrary discretion which cannot be reviewed on appeal or error. But this rule does not attach, unless by counter affidavits, or otherwise, circumstances of suspicion are made to appear. That discretion, when exercised, is to be exercised legally. If not, a court of error will correct the court below. *Ogden v. Payne*, 5 *Cowen* 15; the *People v. Vermilyea*, 7 *Cowen* 385, 395.

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The court below, therefore, should have granted a continuance; and if so, it was error afterwards to refuse a new trial. See cases cited above, and see also on both points, *Van Vlaricum v. Ward*, 1 Blackf. 50; *Fuller v. The State*, 1 Blackf. 63; *Higginbotham v. Chamberlayne*, 4 Munf. 547; *Smith v. Snoddy*, 2 Marsh. 382; *Davis v. Gray*, 3 Litt. 451.

We contend, also, that there was error in refusing a new trial, upon the affidavit of newly discovered evidence. The affidavits of the witnesses whose testimony was so discovered, are attached to the motion for a new trial, and show that their testimony would have much reduced the claim of the plaintiffs below. The testimony is not cumulative, because no evidence whatever appears to have been given by the plaintiff in error on the trial. The rule is, that a new trial will not be granted, where the newly discovered testimony goes to the same fact which was litigated on the former trial, and where it is to corroborate former testimony. *Steinback v. Col. Ins. Co.*, 2 Cain. 129; *Smith v. Brush*, 8 J. R. 84; *Pike v. Evans*, 15 J. R. 210; *The People v. Sup. Ct. of N. York*, 10 Wend. 295; *Chatfield v. Lathrop*, 6 Pick. 417, 418; *Gardner v. Mitchell*, 6 Pick. 114.

In this case the record does not show that any testimony whatever was offered by Burris in the court below, and therefore the newly discovered evidence could not have been cumulative.

TRAPNALL & COCKE, contra:

The defendant having abandoned the objections raised on account of the variance between the writ and declaration, by appearing and pleading, the first question presented for the consideration of the court, relates to the sufficiency of the second affidavit for a continuance, and this we regard as defective in several material respects. The deponent does not state that he firmly believes he can prove the facts alleged by the absent witness. In *Owen v. Starr*, 2d Littell 233, the court say that as an affidavit for a continuance is the testimony of the party interested, it ought to be construed with some degree of strictness. In looking over this, we discover another defect worthy of notice. The statement is, that he *expected to prove*, by the absent witnesses, the facts. This is an equivocal expression, and his expec-

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tation might be founded upon slight grounds. An applicant ought to state, that he *firmly believed* he could prove the facts by the witness absent. *Less than this ought not to entitle him to indulgence* for the purpose of procuring the witness. See also the same principle referred to and recognized in the case of *Smalley v. Anderson and wife*, 4th Monroe, 269. It will also be found upon examination of the first and second affidavit, that the continuance asked for in both is on account of the absence of *James F. Ellis*, and the statute is imperative that no suit shall be twice continued for the same cause. *Revised Code*, 631, sec. 85. The excuse assigned for not taking the deposition as he might have done, under the rule granted at a previous term of the court, is too vague and unsatisfactory, particularly so in an application for a second continuance. We hold the sound and just rule upon this subject to be, that when a party would relieve himself against the presumption of culpable negligence, the facts in excuse should be stated with so much precision and certainty, as to leave no room for rational inferences against him. The excuse alleged in this instance is, that the witness had left his former place of residence at the time the plaintiff intended to procure his deposition, and removed to a remote part of the county of Arkansas, and that he was not apprized of his residence until two or three weeks before. At what time did he intend to take the deposition of the witness, and what exertions did he use to ascertain his place of residence, when informed of his removal? In regard to this the affidavit is silent. The plaintiff may have been guilty of inexcusable laches in postponing, too long, the time when he intended to take the deposition, or he may have made no exertions whatever to find out the residence of the witness when informed that he had left his former place of abode. It is not enough for the plaintiff to show that he was disappointed in finding the witness at a particular time, when he intended to take his deposition, but he must show that he has used throughout a due and proper degree of diligence to obtain it. The affidavit does not state that he can procure the testimony of the witness by the next term, as required by statute 631, *Revised Code*, sec. 80. Although it is stated in the record that a motion and affidavit for a change of venue were filed, yet neither appear in the transcript sent to this court, nor is any

exception taken to the opinion of the court, overruling the application. The only remaining point to be examined, is the second reason assigned in support of the motion for a new trial, and that is "that the plaintiff has been advised since the trial of the cause of the existence of important evidence, of which he was unadvised before or at the time, which would diminish the claim of defendants about two hundred dollars, and that plaintiff had used due diligence to obtain all the testimony in his power." "To entitle a party to a new trial on the ground of newly discovered testimony, the following facts should be shown: 1st. *The names of the witnesses* who have been discovered. 2d. That the applicant had been vigilant in preparing his case for trial. 3d. That the new facts were discovered after the trial, and would be important. 4th. That the evidence discovered will tend to *prove facts which were not directly in issue on the trial, or were not then known or investigated by proof.*" *Ewing v. Price*, 3d J. J. Marsh. 522. The petition in this case does not disclose the name of the witness or witnesses by whom he expects to establish the newly discovered testimony. It does not state what that testimony is, nor does it show that the newly discovered testimony would apply to facts which were not in issue, or which had not been contested on the trial. In all these important essentials the affidavit is insufficient. And the principle laid down in the case above referred to is, that when a motion is *overruled*, the judgment will not be reversed, *unless it had been clearly shown that the complaining party had made out a good cause, conformably to the rules prescribed in such cases.* Upon the subject of new trials, and of testimony discovered after verdict, see *Daniel v. Daniel*, 2d J. J. Marsh. 52; *Wells v. Phelps*, 4th Bibb 573; *Risspass v. McClannahan*, *Hardin R.* 345; *Smith v. Brush*, 8th John. 84.

None of the testimony before the jury has been embodied in the bills of exception, and there is nothing by which this court can determine whether or not the court below erred, and in such cases the presumption always is that they did not.

LACY, Judge, delivered the opinion of the Court:

This cause comes up by appeal taken by the defendant, from the judgment of the court below. The assignment of errors present

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these three questions: *First.* Did the Circuit Court err, in refusing to quash the writ? *Secondly.* In overruling the appellant's motion for a continuance of the cause? And *lastly*, in not granting him a new trial? That the court below decided rightly in refusing to quash the writ, there can be no doubt, for after the motion was made and overruled, the appellant appeared and pleaded to the action, and his appearance and plea cured whatever defects there might be to the writ, if indeed any existed. The object of the writ is to bring the party into court, and if he appeared and pleaded to a defective writ, its insufficiency is cured, and so it has been frequently ruled by this court.

It is equally clear that the court below did not err in refusing to grant a continuance of the cause, on the appellant's motion and affidavit. The record proves that the cause was continued at the December term, 1838, on the motion and affidavit of the appellant, and that an order was then entered by consent, for the parties to take depositions generally.

The affidavit that was then filed and sworn to, shows that the continuance at the December term, 1838, was asked for and obtained on account of the absence and materiality of the evidence of James Wise and James F. Ellis, two of the defendant's witnesses. The affidavit which was filed and sworn to at the May term, 1839, shows that the motion which was made for a second continuance of the cause, was also asked for on account of the materiality and absence of the testimony of James F. Ellis alone. The cause was once continued for James F. Ellis' testimony, and the second continuance was refused on the appellant's motion for the same identical evidence. The statute in regard to the subject of continuances declares, "that no suit shall be twice continued for the same cause." *Rev. Statutes* 631, section 85. The affidavit in behalf of the appellant in error for a second continuance, is defective in no other material point. It does not state as the statute requires, "that the appellant had reason to believe that he could procure the attendance of the witnesses by the next term of the court, or that he could procure his testimony by that term." This statement the act requires upon every application for a continuance, and if the party in his affidavit fails to make it, then he

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has no right to a continuance. *Revised Statutes*, page 631, section 86.

The affidavit alleges that the appellant expects to prove by the absent witnesses, an offset of two hundred dollars against the appellees' demand. This statement, according to the practice of the English, and in most, if not all of the American courts, would be wholly insufficient to entitle a party to a continuance. These expectations may be founded on slight and unreasonable grounds, and such as by no means amount to a firm conviction or belief, that he can prove the facts set forth in his affidavit, which the common law requires in every instance upon application for a continuance. *Smalley v. Anderson*, 4 Mon. 369; *Owens v. Starr*, 2 Litt. 232.

But our statute seems to have changed the whole course of the common law, as well as the practice of most if not all the courts of our own country; for it only requires the appellant to state that he expects to be able to prove the facts contained in his affidavit, by the absent witness. The affidavit in this particular must therefore be considered as correct, for it strictly complies with the provisions of our statute, which is all it can be expected to do.

It will be recollected, that at the December term, 1838, an order was made, giving the parties leave to take depositions generally, and that the cause was then continued on motion of the appellant, for the want of James F. Ellis' testimony; and that the case was not finally tried and decided until the May term, 1839. The appellant in error, then, had sufficient time to have procured the attendance of the witness, or his testimony, if he had used due diligence in preparing his case for trial. We hold the true rule on this subject to be, that he who seeks to relieve himself from the presumption of culpable negligence, is bound to show such state of facts or circumstances, as will prove he has used due diligence, or as will take his case out of the legal inference which stands against him. In the present instance the appellant has wholly failed to state in his affidavit any such facts or circumstances as will relieve him from the presumption of the rule. He shows no reasonable excuse why he did not take the deposition of the absent witness before he applied to do so, which was only two or three weeks prior to the commencement of the trial. There is no

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unavoidable circumstance alleged which prevented him. The appellant surely does not show a reasonable excuse for not using due diligence, when he alleges, that at the time he applied to take the witness's deposition, he had left his former residence, and had removed to a remote part of Arkansas county. We are not positively informed when this application was made to take the deposition. Why is the fact not stated, and the exact time given? The presumption is, that but a short time before the trial, and that reference is conclusively sustained by the record, why did not the appellant apply to take the witness's deposition before? In failing to do so, he must therefore be considered as guilty of culpable negligence.

Again, the affidavit alleges, that the appellant was not apprised of the witness's present residence, until two or three weeks before the commencement of the trial. It gives no excuse why he was not apprised of his present residence previous to that time, nor does he show that he used diligent search and inquiry to find it out. He certainly was not entitled to a second continuance unless he proved that he had diligently searched for and inquired after the residence of the witness, and that he could not possibly find out where he resided, nor could he by any practicable means in his power procure his testimony. In failing to state these important and essential facts, the affidavit is totally insufficient to authorize a suit, much less a second continuance, and therefore the court below acted properly in refusing the continuance.

It has been correctly argued by the counsel for the appellant, that the power to grant or refuse continuance, is a sound, discretionary, legal power, inherent in all courts, and given for the express purpose of preventing delay and promoting the ends of justice; and that should the Circuit Court, in the exercise of its discretionary power, capriciously or arbitrarily sport away important rights belonging to either party, that their decisions and judgment would be examined in this court, and liable to be corrected on appeal or in writ of error. See *Revised Statutes*, 631; *Rex v. D'Eon*, 3 Burr. 1514; 1 *W. Black.* 514, S. C.; *Ogden v. Payne*, 5 Cowen 15; *The People v. Vermilyea*, 7 Cowen 388, 395; *Hooker v. Rogers*, 6 Cowen 577. This is no doubt the correct rule on the subject; but the case under con-

sideration does not fall within the principle stated, and therefore cannot be benefitted by it. It may be proper here to remark, that this court would not reverse a decision or judgment below, for merely granting or refusing a continuance, unless it clearly and positively appears from the face of the record, that the court who decided the cause had been guilty of a palpable and manifest violation of public duty, seriously prejudicing the rights of the parties complaining.

The only remaining point to be determined is, did the Circuit Court err in refusing a new trial, on the ground of newly discovered evidence on the trial. The doctrine upon this subject is well settled, both upon reason and authority, and we will now fully state it. In order to entitle a party to a new trial, on the ground of newly discovered evidence since the former trial, the affidavit in the case must prove, 1st, the names of the witnesses whose testimony has been discovered, and the facts expected to be established by them; 2d, that the facts and circumstances as proved, must show that the applicant has used due diligence in preparing his case for trial; 3d, that the facts and circumstances newly discovered, have come to his knowledge since the determination of the trial, and they must be such as if adduced on the trial were competent to prove the issue, and would probably have changed the verdict; and 4th, that the evidence discovered is not cumulative of that previously relied on, and that it will tend to prove material facts, which were not put directly in issue on the former trial.

These principles are well settled by a series of broken decisions, which is perfectly conclusive on the point. *Ewing v. Price*, 3 J. J. Marshall, 520; *Daniel v. Daniel*, 2 J. J. Marshall 52; *Wells v. Phelps*, 4 Bibb 563; *Smith v. Brush et al.*, 8 J. R. 84; *Pike v. Evans*, 15 J. R. 210; *The People v. Superior Court of N. Y.*, 10 Wend. 295; *Gardner v. Mitchell*, 6 Pick. 114.

The application of the rule as here laid down, will test the question now in controversy. The bill of exceptions in this case fails to set out any portion of the evidence that was adduced upon the trial. The legal presumption, then, is in favor of the verdict and judgment below, and they cannot be disturbed unless it satisfactorily appear,

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affirmatively, that they were evidently and materially erroneous. The affidavits filed in support of that motion for a new trial, do not prove that the defendant below used any exertions, or even attempted to prove the evidence of the newly discovered testimony on the trial.

The appellant's affidavit does not show that he used due diligence to procure their attendance or testimony; consequently, he is not entitled to the benefit of the evidence which he might have discovered before the trial, but which has come to his knowledge since, merely because he made an effort or exertion to procure it before that time.

The affidavit is fatally defective in another point of view. It wholly fails to establish the position that the newly discovered evidence is not cumulative, or that it does not put directly in issue the same facts that were determined by the jury. The presumption is, that it is cumulative of the evidence adduced on the trial, and there is nothing on the record to contradict or overdraw this presumption. It must then stand as full proof on that point, and it clearly justifies the conclusion of the newly discovered evidence, upon the ground of being communicative testimony. Even if the newly discovered evidence had been introduced on the trial, we are authorized to presume it would materially have changed or altered the verdict.

It is true, that in the statement of the witnesses above newly discovered, evidence is filed in support of the appellant's motion for a new trial, the process of the work and labor sued for, is set down at a much lower rate than is charged in the plaintiff's bill. But that statement fails to show that the witnesses were carpenters by trade, or that they are judges of the prices of such work and labor. Besides, if their testimony had been adduced upon the trial, it might and probably would have been disproved by the evidence in the case. This is the legal inference following the verdict and judgment, and the appellant cannot except from its consequences and effects, unless he shows affirmatively by spreading the whole testimony upon the record, that such would not have been the fact. In failing to rebut and disprove this presumption, he stands bound

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by it, and therefore this newly discovered evidence cannot avail any thing on his motion for a new trial. Upon each and all of these grounds, it is perfectly manifest, that the court below decided correctly, in refusing to grant the appellant a new trial. The decision and judgment of the Circuit Court must therefore be affirmed, with costs.

BALLARD and others against NOAKS.

ERROR to Washington Circuit Court.

2	45
70	220
2	45
178	300

A party to the record cannot in general be examined as a witness in the case.

A co-trespasser or co-tort-feasor, is not in general a competent witness on either side.

A joint trespasser who has suffered judgment to go against him by default, is not a competent witness for the plaintiff.

In both criminal and civil cases, a party who is put on trial at the same time with other co-defendants, cannot be used as a witness until he has been first acquitted or convicted. A verdict restores his competency, provided it does not render him infamous.

To entitle one defendant, where several are put on trial together, to a verdict first in his own case, it must satisfactorily appear to the court which tries the cause, that no evidence has been adduced against him, and that his testimony is important for the other defendants.

This privilege is awarded him, upon the express condition that there has been no proof against him, tending to prove the charge laid; for if there are any facts or circumstances proved on the trial, going to establish his guilt, though they may not be sufficient to convict him, still he has no right to have his case left to the jury, and afterwards to come in and testify.

Where the plaintiff has closed his testimony, and has wholly failed to adduce any evidence against some of the defendants, it is the duty of the court to permit the jury to retire and find a verdict of acquittal as to those defendants, if the others wish to use them as witnesses, and show by affidavit or otherwise that their testimony is material.

And if the court, in the exercise of this discretionary power should commit a clear, palpable error, seriously prejudicing the rights of the other defendants, it could be reached by appeal or on error.

An affidavit in support of a motion for a new trial, on the ground of surprise and newly discovered testimony, which wholly fails to show any clear facts or circumstances, showing that the party was surprised on the trial, or had used due diligence, gives no support to the motion.

In trespass, it is error to instruct the jury that if the defendant entered first upon the plaintiff's premises by his permission and consent, and afterwards committed any unlawful act, he is to be considered as a trespasser *ab initio*.

Where a party enters by public license or authority of law, and afterwards, in the prosecution of his designs, commits any unwarrantable act, the law regards him as a trespasser *ab initio*, and holds him fully answerable for all the injury committed; and he is liable, not only for the unlawfulness of the particular act, but also for his original entry.

But where a party enters upon the premises of a private person, by his express or implied consent and permission, and afterwards commits any unlawful act, he is only amenable for his subsequent unwarrantable conduct, and for nothing more.

In such case, the original entry, being lawful, cannot be made unlawful by any subsequent illegal act. And if a contrary instruction is given, the judgment will be reversed.

An accord, to be a bar, must be received and accepted in satisfaction. Accord without satisfaction is no bar.

In general an accord should be executed and not executory.

Where the plaintiff received from one of the defendants, (who were joint trespassers), seventy-eight hides, of the value of \$250, as indemnity and redress for the trespasses committed, it was such an accord and satisfaction as constitutes a bar to an action *any or all* of the co-trespassers.

Although the evidence spread on the record is not sufficient, when taken by itself, to sustain the judgment, yet if the record does not state that *no other* testimony was adduced, it will be presumed that there was other testimony sufficient to sustain the verdict and judgment.

Ballard and other against Noaks.

This was an action of trespass, commenced by *Jesse Noaks* against *Thomas B. Ballard, John Hill, James Mitchell, Alfred Bryan, and Daniel Thomison*, in Washington Circuit Court.

The first count in the declaration, was for entering the plaintiff's tanyard, tearing up and damaging the vats, taking out hides, trampling them in the mud, &c., and seizing and carrying away to their own use 208 sides of leather.

The second count was simply for seizing and carrying away 208 sides of leather.

The third count was for a common assault and battery.

The fourth count was for entering the plaintiff's close, (tanyard), and ejecting and moving him therefrom.

The defendant pleaded the general issue, which was joined in, with leave to give all special matter in evidence.

The plaintiff then entered a nol. pros. as to *Bryan*, one of the defendants, and a jury was called to try the issue.

The substance of the evidence in the case, is given in the opinion of the court, to which the reader is referred. When the plaintiff concluded his testimony, the attorney for the defendants moved the court to permit the jury first to find as to *Thomison*, one of the defendants, in order that the other defendants might use him as a witness in their behalf, upon the ground that the plaintiff had offered no evidence of his guilt, and that his evidence was material to their defence. This motion the court overruled.

Upon the evidence given in the case, and for which the reader is again referred to the opinion, the court instructed the jury, that if the defendants entered plaintiff's close by permission of the plaintiff, and did nothing more than plaintiff consented to, the jury should find them not guilty; but that, although they entered by plaintiff's permission, if they proceeded beyond the license so given by the plaintiff, or committed any unlawful act while there, they were to be taken as trespassers from the beginning; that if *Noaks* recognized *John Hill* as the agent of *Seaborn Hill*, who was the owner of the leather, he was, so far as this case was concerned, to be considered as such agent; that if plaintiff and defendant agreed to settle their difficulties by defendant's giving plaintiff so many sides of leather, to be

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then valued by disinterested persons, who were to be chosen by the parties, the defendants were not entitled to remove the sides of leather until they had been so valued; and further, that accord and satisfaction was in effect pleaded, and that it was a good plea only when defendant gives to plaintiff some consideration, for which he agrees to relinquish his right of action against him; and that satisfaction, to be a bar, must not only be *offered* by one party, but *accepted* by the other, unconditionally, or if conditionally, the condition must be *complied with*, and that if the satisfaction in this case was complete without the receipt, the jury would find for the defendants.

The evidence and instructions were made a part of the record by bill of exceptions, and the evidence is stated by the bill of exceptions to be the whole testimony in the case.

The jury found a verdict of guilty against *Ballard*, *Mitchell*, and *Hill*, and assessed the plaintiff's damages at \$150, after deducting \$208 80, the amount of the receipt mentioned in the evidence. *Thomison* they found not guilty.

The defendants *Ballard*, *Mitchell*, and *Hill*, then moved for a new trial, on the grounds that the verdict was contrary to evidence; that the court refused to permit the jury first to find as to *Thomison*; that the finding was general, when no evidence was offered conducing to prove the facts alleged in one of the counts; that the defendants were surprised by the testimony introduced by plaintiff to prove the terms of the contract entered into between the defendant *Hill* and the plaintiff, they having been present, and knowing the evidence to be untrue; and that since the trial they had *ascertained* a witness by whom they could prove that no trespass upon the person or property of the plaintiff was committed; and that the court erred in the instructions given to the jury.

This motion was accompanied by the affidavit of *Mitchell* and *Ballard*, which is, in substance, that they were surprised by the testimony as to the agreement made between *Noaks* and *John Hill*; that the agreement was entirely different, and stating what it was; that *Noaks* voluntarily consented to their taking the hides, and that they took none but such as he directed them to take; that *Ballard* was a mere spectator, and had no agency in the transaction, and that *Mitchell*

assisted Hill with the permission of Noaks, and committed no trespass, and offered no violence to Noaks; that Hill never refused to comply with his agreement with Noaks; and that they have discovered a witness since the commencement of the trial, whose testimony they believe they can procure, by whom they can prove the statements in the affidavit, as they are informed and verily believe; that they were not apprised of the materiality of his testimony, and that they could not avail themselves of it, or they would have done so.

The court overruled the motion for a new trial, and the defendants brought up the case by writ of error.

WALKER, for plaintiffs in error:

There can be no question but that the court below erred in overruling the motion to permit the jury to find as to Thomison. The doctrine is discussed at length in a case directly in point, in *Wright v. Chandler*, 4 Bibb 422, in an action of trespass, where a similar motion was made; and the court said in delivering an opinion in that case, "these proceedings, we are of opinion, are strictly regular. It was proper to order the jury to retire and find as to them, before the case was disposed of as to the other defendants." The same principle is settled in *Dougherty v. Dorsey*, 4 Bibb 207.

The instruction given by the court below, and assigned for error, were well calculated to perplex the jury. The general doctrine, that if one enter peaceably, and afterwards commit a trespass, that he is esteemed a trespasser from his first entry, is not controverted, nor is it necessary to do so to sustain the errors assigned. They may have entered by permission, and having entered, they might do any act that did not amount to trespass, without becoming trespassers; yet the court instructed the jury that if they did any act other than they were licensed to do, they are to be taken as trespassers from the beginning. Suppose A have B's property, and B, even by falsehood, get possession of it, trespass will not be sustained; yet, although such was the fact from the evidence, the jury could not, from the instruction of the court, find for the defendants. The next instruction but enforces upon the jury the necessity of finding for the plaintiff, for the court instructed them that if the leather was to be valued before

taken away, the defendants had no right to it till it was valued. The last instruction violates a well settled principle of law. It is true that accord without satisfaction is not a good defence, but it is distinctly decided in *3d Johnson's Cases*, page 234, that accord without tender of satisfaction, amounts to satisfaction; yet the court instructed the jury that the satisfaction *must* be accepted unconditionally, or if there be a condition, it *must* be complied with. Now the compliance would be the delivery of the receipt; yet with a knowledge that tender had been clearly proven, the court gave this unqualified instruction.

In the motion for a new trial in the Circuit Court, the defendants, by affidavit, show a surprise, by the statements of the only witness, who proved the terms upon which the hides were to be taken, (a boy), the son of the plaintiff. They state in what the surprise consisted; that they were present, and knew the statements made by the boy to be false; they state that they can prove, by a witness discovered since the trial, a different contract; they show what the contract is. See *2d Bibb* 33; *3d Marshall* 109. Ballard and Thomasin are not connected with this taking of the leather. Admit that after entering they had committed an assault and battery on plaintiff, could they be joined in the same action with those who came for the leather? It is conceived not. But they committed no trespass, and it is proven by plaintiff's witnesses that they came for quite different purposes. The first count, for entering the close, &c., is not sustained in evidence in this particular. There is no proof where the alleged trespass took place. See *2d Selwyn* 483.

LACY, Judge, delivered the opinion of the Court:

Before we proceed to examine and determine the questions of law and of evidence that are raised on the assignment of errors, it becomes necessary to state such parts and so much of the testimony, as is applicable to the case now under consideration.

A short time previous to the first day of March, A. D. 1838, Jesse Noaks, the plaintiff in the action, whom the proof shows is a tanner by trade, represented himself as the lawfully constituted agent of Thomas B. Ballard, for the purpose of purchasing raw hides from

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one Seborn Hill. Thereupon, Hill sold and delivered to him a quantity of raw hides, amounting to two hundred and eighty dollars and eighty cents, for which Noaks executed and passed Ballard's receipt to Hill. As soon as Ballard was informed of the purchase, he disclaimed the contract, and denied the agency of Noaks. Thereupon, Seborn Hill deputed John Hill as his agent, to demand of Noaks payment for the hides, and if he could not get the purchase money for them, to take back the hides. Noaks had the hides in tan when John Hill applied for payment for them. Noaks refused payment, but offered to give back part of the hides, which Hill at that time refused to accept. The day after this happened, John Hill, in company with Ballard and Bryan, went to Noaks' tanyard, and it was then and there agreed between Noaks and John Hill, that each of them should choose one disinterested person, and value the hides in tan, which Noaks had purchased of Seborn Hill. Upon this agreement being entered into, John Hill, with the assistance of Mitchell, and Bryan, and Noaks' son, and by the express permission and consent of Noaks, commenced drawing the hides from tan, and separating them from the leather of other persons which Noaks also had in tan. Noaks pointed out to them the tan-vats that contained the hides he had got from Seborn Hill, and he gave them the description and marks by which they could be known. He then left the tanyard to get some person to come and value the leather, but before going away he requested the defendants not to draw his leather from any other vats except those he had shown them, as they contained all the hides he had purchased from Seborn Hill. Noaks did not return until the next day; and on reaching the tanyard he discovered other vats had been examined besides those he had pointed out, although the defendants had not taken any hides belonging to his customers, but only those that answered the description given by Noaks, and which was claimed as the property of Seborn Hill. Noaks thereupon became angry, and ordered John Hill, Mitchell, and Bryan, to desist from drawing any more hides from tan, which they accordingly did. A quarrel then ensued between John Hill and Noaks, in regard to the valuation of the leather, the latter insisting to have it valued, and the former objecting to it, on the ground that the hides were the property of Seborn Hill.

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Upon Noaks using reproachful words in regard to Ballard, the latter picked up a limehook, and made towards Noaks, who put his hands into his pockets as if he intended to draw a weapon, but he did not draw. Thereupon Hill drew a pistol and Bowie-knife, but immediately concealed them, and Noaks then retreated into his house, and Thomasin said that if he came out with a pistol he would split his head open. Mitchell stopped Ballard as he advanced on Noaks, and there was no wound given or battery committed. After the altercation and affray had subsided, the defendants, Hill, Mitchell, and Bryan, loaded Ballard's wagon with two hundred and eighty sides of leather, which they had drawn from tan, and the wagon containing them was drove off, under the directions of John Hill. After taking that amount from the hides purchased of Seborn Hill, there was still left in the possession of Noaks seventy-eight sides of leather, which he valued at two hundred and fifty dollars. It was then agreed between John Hill and the plaintiff in the action, that John Hill, as the agent of Seborn Hill, should have all the leather that had been put in the wagon and carried away, and that Noaks should retain all the leather in his possession, in full satisfaction for the injury he had received. It was further stipulated between the parties, that Ballard's receipt should be taken up and delivered to Noaks, and he expressly agreed to look to defendants, Thomasin and Bryan, to take up the receipt and deliver it, which they promised to do. There was no time fixed when the receipt was to be delivered. The proof shows that Thomasin and Bryan did procure the receipt of Ballard from Seborn Hill, and that they did, on the 6th day of April, 1838, offer to deliver the same, which Noaks refused to accept. The record then shows that Noaks admitted the leather to be property of Seborn Hill, both before and after the trespass complained of was committed. This constituted the substance of the proof adduced upon the trial.

The assignment of errors questions the correctness of the opinion and judgment of the Circuit Court, first in refusing to permit the jury to retire, and find first as to Daniel Thomasin, one of the co-defendants; secondly, in the instructions given and refused to the jury; and, lastly, in overruling the motion of the defendants below for a new trial.

It is a well settled principle of practice supported by all the

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authorities on the point, that a party to the record in general cannot be examined as a witness in the case. This is a technical rule, founded partly on considerations of public policy, to prevent perjury, but mainly upon the real or supposed interest that the party to the record is presumed to have. Parties to the record are the suitors in court, and they are presumed to have a direct immediate interest in the subject matter in dispute. To prevent them, then, to testify in the cause, would be to make them witnesses for or against themselves, which the law never allows; as long as their interest is supposed to exist, their incompetency continues. The moment their interest is presumed to have terminated, the objection to their competency ceases, and their right to testify is restored. A co-trespasser or tort-feasor is not in general a competent witness on either side. He cannot be called as a witness for the plaintiffs, for so it was expressly ruled by Lord Kenyon, in *Barnard v. Dawson*, decided at Guildhall sitting, 1796, and in *Chapman v. Graves and others*, 3 *Camp. N. P.* 333. The learned judge who tried the cause, remarked, that a joint trespasser who had suffered judgment to go against him by default, was not a competent witness for the plaintiffs. The rule holds good in criminal as well as civil cases, and a party who is put on trial at the same time with other co-defendants, cannot be used as a witness until he has been first acquitted or convicted. A verdict in his case restores his competency, provided it does not render him infamous, and when he has been either acquitted or convicted, he can then be called as a witness.

His interest in legal contemplation is no longer presumed to exist or to operate on his mind, where there is a finding in his case, and therefore his competency as a witness is revived and exists in full force. But to entitle him to the privilege of a verdict first in his own case, when he has been put on his trial at the same time with the other defendant, it must appear satisfactory to the court that tries the cause, that no verdict has been adduced against him, and that his testimony is important for the other co-defendants. This privilege is given on the express condition that there has been no proof offered against him, tending to prove the charge laid; for if there are any facts or circumstances proved on the trial going to establish his guilt, though they may

not be sufficient to convict him, still he has no right to have his case put to the jury, and afterwards to come in and testify as a witness for the other defendants. When the plaintiff has closed his testimony, and has wholly failed to adduce any evidence against one of several joint defendants, it unquestionably becomes the duty of the court who tries the cause, to permit the jury to retire and find a verdict of acquittal first as to the defendants against whom no proof has been offered, provided the other co-trespassers wish to use him as a witness, and show by affidavit or otherwise the materiality of his statement in their defence. Not to allow other co-defendants the full benefit of this principle, would be to put it completely in the power of the plaintiff, at his mere option, to exclude the whole of their defence, by making all the witnesses joint trespassers in the same action, or including them all in the same indictment. The plaintiff has the undoubted right of including in his charge as many persons as he may think proper, for the right itself is an invaluable one when legitimately exercised, and is often found in practice indispensably necessary for the due administration of private as well of public justice. If, however, either through mistake or by design, it is attempted to be exercised unjustly or expressly, then the court who tries the cause is invested with ample discretionary authority to permit the jury to bring in first a verdict of acquittal as to the defendant against whom there has been no evidence offered, so that his testimony may be used for the rest of his co-defendants; and should the court, in the exercise of their discretionary power, commit a clear and palpable error or mistake, seriously prejudicing the right of the other co-defendants, then it is quite obvious the judgment below, if excepted to, could be reached by appeal or upon error. But then it must appear there was no evidence whatever offered against the defendant, whose testimony was attempted to be used on the trial. These positions are clearly supported by all the authorities upon the subject, as a reference to them will demonstrate. *2d Starkie's evidence* 763, 4, 5, 6, 7, 8, and cases there cited; *Man v. Ward*, *2d Atk.* 229; *The King v. Ellis and others*, *McNally* 55; *The People v. Bill*, *10 J. R.* 95; *Barney v. Cutlar*, *1st Root* 489; *Brown et al. v. Howard*, *14 J. R.* 1191. The application of these principles to the case now under consideration, unquestionably prove that the court below

committed no error in refusing to permit the jury to retire and bring in a verdict first of acquittal as to Daniel Thomasin, one of the defendants. He was put on his trial at the same time with the other co-defendants, and was charged as a joint trespasser with them. The evidence may not have been sufficient, when taken altogether, to have convicted him, and so the jury rendering their verdict determined; but that does not show there was no proof offered against him, tending to establish the trespasses alleged to have been committed. The record clearly demonstrates that there were facts or circumstances proved on the trial, going to establish his guilt, and that, too, of no slight or doubtful character. The defendant Thomasin was present during the whole of the altercation and assault, and appears by words and encouragement to have participated in the transaction; for upon the plaintiff retreating into his house, Thomasin said that if he came out with a pistol he would split his head open. This declaration showed his intention to be hostile, and that he participated in the acts, and entered into the feelings of the other co-trespassers. Then there was certainly some proof offered against him; and that being the case, it necessarily follows, the court below decided correctly in refusing to permit the jury to retire, and find first as to the defendant Thomasin. His co-defendants were not entitled to the benefit of his testimony, unless the plaintiff failed to adduce any proof against him. There was evidence adduced against him, and therefore the objection to the opinion of the court below on this point is not well taken.

The plaintiff in error filed the affidavit of Thomas B. Ballard and James Mitchell, two of the co-trespassers, in support of their motion for a new trial, on the ground of surprise and newly discovered evidence since the determination of the trial. But the motion for the new trial can receive no additional support from the affidavit, for it wholly fails to state any clear facts or circumstances showing that the defendants below were surprised on the trial, or that they used due diligence. The affidavit is therefore essentially defective, for it does not contain a single one of the essential requisites laid down in the case of *Burris v. Wise* and *Hind*, decided during the present term of this court.

In regard to the second question presented by the assignment of

errors, it is evident that the court below erred in instructing the jury that if they believed from the evidence, that the defendant in the action entered first upon the plaintiff's premises by permission and consent, but afterwards committed any unlawful act, they were to be considered as trespassers *ab initio*, and punished accordingly. Blackstone says, 2d Chitty's edition, page 210, "every unwarrantable entry upon a man's soil, the law entitles a trespass, by breaking his close." In the eye of the law, every man's land is set apart from his neighbor's, by real or imaginary lines, and every unlawful entry upon it, carries with it some actual or supposed injury to the premises. 7 East 207; 2 Strange 1004; 1 Burr. 133. One man may lawfully enter upon the premises of another by public license or authority of law, or by the private permission and consent of the owner or occupier of the soil. If he enters by either of these ways, he cannot be treated as a trespasser, for his entry is lawful, being given him by authority of law, or by the permission of a private person.

When a party enters by a public license, or by authority of law, and afterwards, in the prosecution of his designs, commits any unwarrantable act, the law regards him as a trespasser, *ab initio*, and holds him fully answerable for all the injury committed; to that extent not only, he is liable for the unlawfulness of the particular act done, but for his original unwarrantable entry. For when the law grants a general or special license to enter, it gives it conditionally, that it will be only used for that purpose alone; and should it be used improperly, or in violation of the authority given, the law adjudges the party who thus abuses its license, a trespasser *ab initio*, and punishes him accordingly, because his subsequent acts show his disposition to have been evil from the beginning, and therefore make his original entry unlawful. This principle proceeded upon the ground of public policy; the law is too sacred and important an office, to allow a private person to violate either its express or implied guaranty, without holding him directly responsible for all the remote as well as immediate damages that have accrued, in consequence of any unlawful act he may have committed. But this doctrine does not hold good where the party enters by the consent or permission of a private person; the reason of the rule no longer exists, and of course the rule

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itself ceases. When a party enters upon the premises of a private person, either by his express or implied consent and permission, and afterwards commits any unlawful act, he is only amenable for his subsequent unwarrantable conduct, and for nothing more. If he enters by the consent of a private person, his original entry being lawful, cannot afterwards be made unlawful by any subsequent illegal act; the law does not declare his intention evil from the beginning, or from his original entry, but from the time he committed the first unwarrantable act; as he has transgressed no public license given by law, but only entered with the permission of a private person, his intentions are regarded as innocent and harmless up to the time of the first trespass committed, and he is liable to be punished for all his subsequent illegal acts, and for nothing more. This distinction between the two classes of cases, although it may be said to be subtle and refined, nevertheless it exists in reason and sound policy, and is distinctly and broadly laid down by all the authorities upon the subject. *2d Starkie's evidence* 445; *Gardner v. Campbell*, 15 *Johnson Rep.* 401; *4 Day* 257.

If the position be well established, and of that we think there can be no doubt, then it necessarily follows that the Circuit Court erred in charging the jury. If they believed from the evidence that the defendant below entered upon the plaintiff's premises by permission and consent, but afterwards committed any unlawful act, they are to be regarded and held as trespassers *ab initio*. It is clear that the consent or permission given to enter on the premises in the present instance was that of a private person, and not a general or special license or authority of law, and of course the instruction to the jury on this point was evidently erroneous and illegal; the record shows they were important, and probably influenced to a considerable extent the finding of the jury; and that being the case, it furnished a good cause for a new trial; and so it has been often decided in this court. We might here close our inquiries, by reversing the judgment and opinion of the Circuit Court upon this point; but while we have the record before us, we deem it proper to lay down the doctrine in regard to what constitutes a good bar to the plaintiff's right of action, under the plea of accord and satisfaction, which in effect

which in effect is specially pleaded in this case. Accord is a satisfaction or agreement between the party injuring and a party injured, which performed, is a bar to all actions on that account. "For example, if the party injured accepts a sum of money or other valuable thing, then that constitutes a redress of the injury, and the right of action is then entirely taken away." 2 *Chitty's Blackstone* 16; *Com. Digest, title Accord*; 2d *Starkie's evidence* 26; *Paramore v. Johnson*, 1 *Ld. Raym.* 566; 12 *Mod.* 376. Consent of a party to accept in satisfaction, without actually receiving it, does not form a valid bar to the action. The accord must be shown to be accepted in satisfaction of the thing demanded; and although that satisfaction may have been agreed upon, still it will be no valid bar to the action, unless it be actually received, and operate in full satisfaction. The satisfaction, as well as the accord, must be reasonable, sudden, and complete. In general, the accord and satisfaction should be executed, not an executory contract. Should it, however, be executory, then, in order to make it obligatory, the terms or the conditions of the agreement must be strictly performed. We do not think it incumbent upon us to determine the question, whether an accord with a tender of satisfaction, and a refusal to accept the satisfaction agreeably to the terms of the contract by the plaintiffs, constitute a good bar and destroy the right of action. That point is not necessarily involved by the pleadings and proof in the cause now before us, and therefore we express no opinion upon it. The accord and satisfaction which was in effect specially pleaded in the case, consist of the agreement made and executed between John Hill, one of the defendants, and the plaintiff in the action. That agreement was an executed, and not an executory contract, as the evidence in the case conclusively demonstrates. The contract was entered into and carried into effect after the trespass complained of was perpetrated; and the satisfaction rendered by the defendant, and which was actually accepted by the plaintiff, operated as a complete, full, and executed satisfaction of all his right of action, not only on account of one, but of all the defendants. An accord and satisfaction made and executed by one of several joint defendants for a tort or other injury, extinguishes the plaintiff's right of action, not only as to him, but as

to his other co-defendants. The whole doctrine in regard to what constitutes a sufficient accord and satisfaction, will be found fully illustrated and explained by the annexed authorities. 2 *Starkie on Evidence* 26; *Paramore v. Johnson*, 1 *Ld. Raym.* 566; 12 *Mod.* 376; 2 *Chitty's Blackstone*; *Com. Digest*, title *Accord*, 3 *Co.* 17; 5 *T. R.* 141; *Fitch v. Sutton*, 5 *East* 230; *Dufresne v. Hutchinson*, 3 *Taunt.* 117; *Lynn v. Bruce*, 2 *H. B.* 317; *Heathcote v. Crookshanks*, 2 *T. R.* 24.

The instruction of the court below, in regard to the plea of accord and satisfaction, is somewhat vague and inconclusive, and not very well calculated to lead the mind of the jury to a correct conclusion.

The court seemed to have proceeded upon the ground, that the accord and satisfaction pleaded and proved on the trial, was conditional and executory, and was not obligatory upon the plaintiff, because he had refused to accept Ballard's receipt, which Bryan and Thomasin promised to get from Seborn Hill, and deliver to him. This agreement with Bryan and Thomasin, in regard to the delivery of Ballard's receipt, did not enter into or form any part of the contract with John Hill, one of the defendants. It was this latter agreement that constituted the accord and actual satisfaction given and received, and which in itself is wholly disconnected and separated from the promise of Bryan and Thomasin, to deliver Ballard's receipt. That promise or agreement as to Bryan, was a mere *nudum pactum*; and as Thomasin, who is shown to be one of the defendants, if he is liable at all, (which, by the bye, is exceedingly questionable), why, then the plaintiff should have his action against him for a violation of the contract. But the evidence clearly proves, if Thomasin should be considered liable in the first instance for the delivery of the receipt, he completely discharged himself from all liability on that account. There was no precise time fixed when the receipt was to be delivered, and as Thomasin procured it and tendered it to the plaintiff within a reasonable time, which he refused to accept, he thereby released himself from all further responsibility. The agreement of Thomasin with the plaintiff was a wholly different and distinct matter from the accord and satisfaction entered into and executed between himself and Hill. The plaintiff not only agreed to

take, but actually did secure from John Hill, as the agent of Seborn Hill, seventy-eight sides of leather, equal in point of value to two hundred and fifty dollars, as indemnity and redress for the trespasses committed. This remedy and redress constituted an actual satisfaction, and took away the plaintiff's right of action against all the defendants. There is no contradiction or discrepancy in the proof in regard to the accord and satisfaction established by all the witnesses. The plaintiff then having no right of action against any one of the defendants, it is perfectly evident that the verdict was expressly contrary to law and evidence; and if there was no other testimony adduced on the trial except what appears in the record, the court below ought, on the defendant's motion, for that cause alone, to have granted him a new trial. But the record fails to state that no other evidence was offered or received on the trial, and that being the case, the presumption is, other testimony might have been adduced which authorized the verdict. Owing to the imperfections of the record, which is cured by the presumption in its favor, we would not feel ourselves justified for this error alone, to reverse the judgment of the court below. But we have already shown that the Circuit Court that tried the case, erred in a material point in the instructions given to the jury; and therefore its decision and judgment must be reversed and set aside, with costs, a new trial awarded, and the cause remanded, to be proceeded in agreeably to the opinion here delivered.

SMITH *against* DUDLEY.

ERROR to Chicot Circuit Court.

Where the record of the court below states that judgment had been rendered at a previous term in favor of plaintiff against defendant, for a certain amount, and that the records of said judgment had been lost or destroyed; and then proceeds thus: "It is therefore considered by the court, that the plaintiff have leave to re-instate his judgment on the record of this court, and that he have execution thereon for his debt, interest, and costs of suit;" this, though an *informal*, is clearly a *final* judgment. It clearly concludes the matter in dispute between the parties, and the order for execution is a final decision. That being the case, a writ of error will lie to reach it.

Where a record is first shown, by proper evidence, to be lost or destroyed, it is competent to prove its existence by a sworn or authenticated copy.

But to warrant such evidence, the document must be *vetustate temporis aut judicaria cognitione roborata*.

But in all the cases on this subject, the question arose incidentally on the trial, and in no instance did the lost record itself constitute the sole foundation or cause of the proceedings.

Without some legislative provision, this court would be exceedingly unwilling to declare, that a lost judicial record, which constituted the sole foundation or cause of action, could be proved or verified merely by *parol*.

Such a proposition can derive no support or countenance from the principles of the common law, and there is no statutory regulation in regard to the matter.

Every judgment or judicial proceeding, to be obligatory, must unquestionably show such a state of case as will give jurisdiction to the court that made the record, and conclusively prove that the party recovering had a good cause of action.

Should the record wholly fail to establish these facts, the defect is fatal, and cannot be amended in any stage of the proceedings.

Unless the jurisdiction be shown, and the cause of action proved, no legal presumption can attach in favor of the judgment below.

The moment the jurisdiction is properly shown, and a good cause of action well laid and proved, the judgment or other judicial proceeding draws to itself all the legal presumption in its favor, which of course stands until it is overthrown by other affirmative matter in the record.

The record in this case fails to show in what manner the lost judgment was proved or verified. It was not proven by the record, for that is shown to have been lost; and as no legal presumption can attach in favor of the judgment, until the court is shown to possess power to enter up such a judgment, it cannot be presumed that the lost or destroyed judgment was proved by an enrolled and properly authenticated copy.

There is no rule of law or practice, that will authorize a court to re-instate upon the rolls or record of its proceedings a final judgment which had been previously given, and enrolled at a former term of the same court, and which subsequently has been lost or destroyed.

Moreover, these proceedings are not only invalid, but absolutely void, because the record does not show that the defendant had any notice of the motion to re-instate the judgment.

It is a principle of natural justice, as well as of legal right, that no one can be bound by any judicial proceeding to which he is not a party; and he cannot be made a party unless an opportunity has been offered him of defending himself.

In the winter of 1838, a great portion of records, record-books, and papers of the Chicot Circuit Court, were stolen from the Clerk's office by some person unknown, and never recovered. At May term,

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1839, in the case of Peter Dudley, executor of Isham Talbot, and assignee of Theobald & Bain, against Grandison C. Smith and others, an entry was made of record, to the following effect: That "the parties came by their attorneys, and it appearing to the satisfaction of the court, that a judgment was rendered in favor of the plaintiff against the defendants, at October term, 1838, for \$8,000 debt, with interest from February 1, 1838, until paid, and costs of suit; and it farther appearing to the satisfaction of the court, that the record of said judgment has been lost or destroyed: Therefore, it is considered by the court, that the plaintiff have leave to have his said judgment re-instated on the records of this court, and that he have execution therefor, for the debt, interest, and costs, aforesaid, and that the said defendants be in mercy, &c."

To this judgment the defendants sued out their writ of error.

At this term the plaintiffs in error moved for a supersedeas, and the defendant in error moved to dismiss, on the ground that no writ of error would lie, the decision of the court below not being a final judgment. The supersedeas was granted, and the case submitted. The cases of *A. W. Webb v. Benj. Estill*, and *White v. Hanger & Winston*, were precisely similar, and the same argument made and decision given as in this.

TRAPNALL & COCKE, for the plaintiffs in error:

If the Circuit Court had the right to replace a lost record, they should not only have *re-instated* the judgment, but the proceedings upon which that judgment was founded, the writ, declaration, &c., which are essential to the existence of the judgment itself, and without which, unless upon appearance and waiver, it is actually void.

In this case, the court and plaintiff seem to have considered the former judgment, although lost, still to have been *in esse*, and an order re-instating it upon the record, all that was necessary to give it efficacy, and accompanied the judgment in favor of the motion with an order that execution issue. By this proceeding, the defendant is precluded from an examination into the character and condition of the original judgment, and debarred all exception. Nor was he

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notified of the plaintiff's motion, or given an opportunity of contesting the proof in support of it. See 1 *Litt.* 27.

LACY, *Judge*, delivered the opinion of the Court:

Before we proceed to examine the questions presented by the record, we will briefly notice an objection that was taken at the bar to the writ of error in this case. It is said the writ will not lie, because there has been no final judgment given in the cause. The facts as they appear on the record certainly do not warrant any such conclusion. The entry contains the decision of the court, recites a former judgment which it shows to be final, and it states the exact amount of the debt, interest, and costs, due, and it then gives leave to re-instate the judgment on the records of the court, and finally it orders an execution to issue for the sum thus ascertained and computed. This, though an informal, is nevertheless a final judgment, for it clearly concludes the matter in dispute between the parties. When the entry was once made, and the term at which it had been enrolled had expired, and the court adjourned, it is certain that the defendant was for ever precluded from again agitating the matter. Admitting it to be questionable, whether or not the first part of the entry of the court amounts in itself to an absolute judgment in the cause, still, however, it cannot be denied that the latter part of the order, which directs an execution to issue, is a final decision, and that being the case, a writ of error will well lie to reach it. *Revised Statutes* 230, section 1. The assignment of errors presents two questions for our consideration and decision. First, that the pleadings and proof in the cause, as appears from the face of the record, laid no valid foundation for the court below to pronounce any judgment whatever in the case. Secondly, that the judgment attempted to be entered *quoad* the defendant below, was illegal and absolutely void, he having no notice of such proceeding, and being no party to the record. Our first inquiry then is, in what manner can a lost judicial record, or one that has been destroyed, be proved or verified.

Blackstone defines a judicial record to be where the acts and judicial proceedings are enrolled on parchment or paper, for a perpetua memorial and testimony, which rolls are called the records of the

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court, and are of such high and supereminent authority, that their truth is not to be questioned. For it is a settled rule and maxim of the common law, that nothing shall be averred against the record. - 3 *Thomas' Coke Littleton* 485; 2 *Chitty's Blackstone* 264.

If the existence of the record is denied, it shall be tried by nothing but the record itself, that is, upon a bare inspection of the record, whether there be any such record or no; else there would be no end of disputes. For Sir Edward Coke observes, "a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, if it be pleaded there is no such record, it shall not receive any trial by witness, jury, or otherwise, but by itself." 6 Co. 53. If the question be as to the existence of a record of the same court, the trial shall be by the inspection of the record itself. When the record of an inferior court is disputed in a superior tribunal, to which is given jurisdiction to revise and correct the proceedings below, the trial is then by examination of the transcript or copy of the record that is sent up, to see whether it be properly authenticated or verified under the signature or seal of office, of the lawfully accredited agent who has the records in charge. 1st *Starkie* 188, 234; *Gilbert's Evidence* 45, 87; *Burk's executors v. Tregg's executors*, 2 *Wash. Rep.* 215; 1 *Starkie* 285; *Bacon's Abridgment, Evidence F.* A record may then be proved by mere production and inspection, or by a properly authenticated copy. As long as the record is supposed to be in existence, its production is indispensable, and its existence can alone be proved by inspection. If its existence be lost or destroyed, and that fact is established by competent evidence, then it may be proved by a regularly authenticated or sworn copy. The production and inspection of a record proves itself and the facts it contains, because it is a public judicial document, in which the law places an extraordinary degree of confidence, from the known credit and integrity of its lawfully appointed and constituted officers, in whose custody it is always supposed to remain. So long as a record is known to exist, it is the very best and highest evidence of itself, or of its contents, that can possibly be adduced. When its loss or destruction is satisfactorily established, there is a legal ground laid for the introduction of secondary evidence, which is never admissible, so long as

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a higher grade of testimony is supposed to exist, or can be produced. The principle that the best evidence must be adduced which the nature of the case will admit of, is too familiar and important to be overlooked in any legal investigation. It lies at the very foundation of all the law on the subject of evidence, and in no instance can it be dispensed with.

In the case now under consideration, if the record had been first shown, by proper evidence, to be lost or destroyed, it was then competent to prove its existence by a sworn or an authenticated copy. But to warrant such evidence, it is said the document must be, accordant to the rule of the civil law, *vetustate temporis aut judiciaria cognitione roborata*, 1 Stark. 194. Upon this principle, it has been held, a copy of a decree may be given in evidence when the original is lost. So when it appeared that the records of the city of Bristol had been burnt, an exemplification of a recovery, under the town seal, was allowed in evidence. 1 Mod. 117; and in *Knight v. Dauler*, Hard. 323; 1 Salk. 285, it has been held that a record of a conviction which had been burnt, might be proved by estreats in the exchequer, and an inquisition of the recusant's lands found returned into the office. 1 Stark. 194; 1 Vent. 257; 2 Starkie 1129; 2 Burr 1072; 4 T. R. 514. In *Dillingham v. Snow et al.*, 5 Mass. 547; *Stockbridge v. West Stockbridge*, 12 Mass. 400, it is laid down that the facts which have become matter of record may be proved by secondary evidence after proof is given of the existence and loss of the record. In *Cook v. Wood*, 1st McCord 139, and in *Lyons v. Gregory*, 3 Hen. & Mun. 237, it has been held that the journals of the court might be read in evidence to prove the existence of the lost or destroyed record, when it was first satisfactorily established that the records of the court had been previously burnt, or so defaced by fire as to be no longer legible. It will be seen by reference to the cases here cited, that the question in regard to the proof of a lost record, arose incidentally on the trial, and in no one instance did the lost record itself constitute the sole foundation or cause of the proceeding. We have not been able to find in our researches any case of that sort, and in the total absence of all direct authority upon the point, we do not feel ourselves warranted in extending the doctrine, without the aid or assistance of some

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legislative provision on the subject. Without some such provision or authority, given by the Legislature, we certainly would be exceedingly unwilling to take upon ourselves to decide that a lost judicial record, which constitutes the sole foundation of the proceeding or cause of action, could be proved or verified by parol. Such a proposition can derive no support or countenance from the principles of the common law, and surely cannot be said to have any statutory regulation in regard to the matter. This being the case, it necessarily follows, that a lost judicial record can only be proved or verified in the manner pointed out, and designated by the authorities quoted. We take the principle to be clear and well settled, that any judgment, or other judicial proceeding, to be obligatory, must unquestionably show such a state of case as will give jurisdiction to the court that made the record, and conclusively prove that the party recovering had a good cause of action. Should the record fail to establish these facts, the defects must be considered fatal in every stage of the proceedings. Unless the jurisdiction be shown, and the cause of action proved, no legal presumption can attach in favor of the judgment and opinion below; for if the court is not rightly invested with jurisdiction, it can pronounce no valid judgment in the cause; and the party having the recovery, is certainly not entitled to the benefit of it, unless he establishes a good cause of action.

The moment the jurisdiction is properly shown, and a good cause of action well laid, the judgment then draws to itself all the legal presumption in its favor, which of course stands, until overthrown by other affirmative matter in the record.

The application of these principles, will readily test the validity of the judgment and proceedings now under consideration. Upon the mere motion of the plaintiff's counsel, the Circuit Court ordered that leave be granted to him to re-instate his lost or destroyed judgment on the rolls or records of the court, and that an execution issue thereon, for debt, interest, and costs of suit. The record wholly fails to show how or in what manner the lost judgment, entered and enrolled at the previous term, was proved or verified. It certainly was not established by an inspection or production of the record itself, for the entry conclusively proves that the judgment had been lost and

destroyed; and of course it could not then have been produced or examined. Was it then proved by a regularly authenticated copy from the rolls?

If it was, the record fails to state that fact, or to exhibit the copy used upon the trial; and as no legal presumption can attach in favor of the judgment, until the court is shown to possess power to enter up such a judgment, therefore we cannot presume that the lost or destroyed judgment was proved by an enrolled and properly authenticated copy.

When a final judgment has once been pronounced in a cause, and the term at which it is given has finally expired, neither the court nor the parties to the record have any longer any power or control over it. It then becomes a public judicial record, carrying with it the seal and sanctity of truth, which cannot be impeached or set aside, except upon the ground of mistake or fraud. It may, however, be examined before a superior and higher tribunal, having jurisdiction of the case, when its errors, if any exist, may be corrected and reversed. We know of no rule of law or practice, that will authorize a court to re-instate upon the rolls a final judgment, which had been previously given and enrolled at a former term of the same court, and which subsequently has been lost or destroyed, and that, too, in a case where the lost judgment constitutes the sole foundation of the proceedings. The common law certainly authorizes no such summary proceeding, nor have we any legislative provision conferring any such power on the courts of record of this state. Besides, it is a legal solicism, in thought as well as in expression, to declare, that which is finally lost and destroyed can again be re-instated and brought to light. If these positions be true, then the Circuit Court unquestionably erred in pronouncing any judgment whatever in the cause. It is equally clear, that the judgment and proceedings in this case, *quoad* the defendants below, are not only invalid, but absolutely void. He had no notice of the pendency of the plaintiff's motion. The record does not show that he voluntarily came in, and made himself a party to the proceedings, or that he waived his right to the notice. The whole proceeding was *ex parte*, and there was no one present, except the court and plaintiffs in the action. It is a maxim of the common law,

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that there can be no suit, unless there be three constituted parties: the actor, *reus judex*, that is, the plaintiff, who complains of the injury done; the defendant, who is called on to make reparation; and the judicial power, to examine the truth of the fact, and determine the law of the case. Another maxim of the common law is, that no one can be bound by any judicial proceeding to which he is not a party, and that he cannot be made a party, unless an opportunity has been offered of defending himself. In the present instance, the defendant below had no notice, either actual or constructive, of the pendency of the plaintiff's motion; and that being the case, as he did not voluntarily make himself a party to the proceeding, the judgment as to him is therefore null and void. The decision and judgment of the Circuit Court must therefore be reversed, with costs, and the cause remanded, to be proceeded in agreeably to the opinion here expressed.

*SMITH and others against DUDLEY.**ERROR to Chicot Circuit Court.*

It would be the better practice not to regard a general assignment of errors, although it has never been expressly ruled or implicitly observed by this court.

Upon a motion to dismiss a suit for want of a bond for costs, on the ground of non-residence of the plaintiff at the institution of the suit, no question as to the sufficiency of the security could legitimately arise, until the fact of the plaintiff's non-residence was established, which could only be done by his own admission, or other competent legal testimony.

And where the fact of the plaintiff's non-residence is nowhere stated in the record, nor stated or recited in the bond for costs, the presumption is that the court below was right in overruling the motion to dismiss.

This was an action of debt, brought by *Peter Dudley*, executor of *Isham Talbot*, deceased, and assignee of *Theobald & Bain*, against *Grandison C. Smith*, *George W. C. Graves*, and *Claiborne W. Smith*. A bond for costs was filed by *Wm. H. Sutton* and *Thomas Ware*, conditioned that *Dudley* would pay, or cause to be paid, all costs which might be incurred in the investigation and determination of the suit.

The defendants moved to dismiss the suit for insufficiency of the bond for costs, which motion the court overruled, and rendered judgment against the defendants. The suit was instituted before the adoption of the revised statutes, but the motion to dismiss was made afterwards.

TRAPNALL & COCKE, for plaintiffs in error:

This was an action of debt brought by a non-resident. The defendant moved to dismiss the cause for want of a sufficient bond for costs. The court overruled the motion.

The propriety of that judgment is presented by the assignment of errors, for the consideration of the Supreme Court.

The condition of the bond is, that the plaintiffs will pay all the costs "that may accrue in the investigation and determination of the case."

The statute requires a bond for all the costs that may accrue in

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the case, and costs may accrue before the investigation and after the determination of the case; and, therefore, the condition of the bond in this case, does not correspond with the statute.

The new statute merely changes the mode of proceeding upon the failure to give bond, and the party is bound to take remedies in existence, at the time he makes his motion.

FOWLER, *contra*:

The defendant in this case insists, that there is no error in the record and proceedings, or in the rendition of the judgment. That he brought suit in the court below, on a writing obligatory, assigned to to him *personally*, in which he was named and described as, and was in fact, *executor* of Isham Talbot, deceased. The term *executor* there used, was but a word of *description*, and the court will perceive that the declaration and process are good, and served according to law; and that judgment was thereupon rendered regularly in the court below, good in substance at least. The bond for costs filed was also good, *in substance at least*, being filed under the old laws, see *Gey. Dig. p. 243, 244, sec. 5*; and if not good, the defendants below did not impeach it in a proper manner, and are therefore excluded from deriving any benefit from any existing defect therein. *Vide cases* decided at a former term of this court, of *Means and Cromwell*, and other cases at same term. This much upon the subject of the record generally, as no error has been assigned by the said plaintiffs in error, leading to any particular point or decision of the court below, which they design to impeach. But two errors are assigned, the first of which, the court will perceive at a glance, has no application whatever, even the most remote, to the case. The record shows no entry of any judgment *nunc pro tunc*; but on the other hand, affirmatively shows that no such order or judgment ever could have been made. Therefore, the first assignment does not touch the case. The second, and only remaining error assigned, is the general one, that *the judgment was rendered* for the wrong party. This is too general; it means nothing, and the court will not examine any error under it. *Vide New Code, title Practice in Supreme Court*. And, also, *the Rules of this Court*.

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Ringo, *Chief Justice*, delivered the opinion of the Court:

The matter first assigned as error is, "that the court below permitted the plaintiffs to enter, or enroll, or re-instate the judgment previously rendered in the case, without any authority in law, and without any notice to the defendant." This assignment is contradicted by the record, which shows affirmatively that the assignment was regularly recorded at the time when it was given, instead of the entry, enrolment, or re-instating of a judgment previously pronounced, and therefore it presents no question to be decided by this court.

The second and only remaining assignment of error, is general, that judgment was rendered for the plaintiffs, whereas, by the law, it should have been for the defendants. The defendant insists, that by the statute regulating the practice in the Supreme Court, in cases brought before it by appeal or writ of error, and the rule of practice adopted by it, such general assignment is not authorized; and that the court should not therefore examine the record, for the purpose of discovering and correcting the errors which may exist therein; and this, we have no doubt, is the better practice, although it has never been expressly ruled or implicitly observed by the court. There certainly would not be any very great hardship in the rule requiring the appellant or plaintiff in error to specify, and set out particularly, the errors whereby he thinks himself aggrieved, by which the court would be relieved from the labor of investigating the whole record, to ascertain whether any error to his prejudice exists in it. Yet, in the present case, we do not deem it necessary to make the rule imperative, or rigidly observe its injunctions, as the result would not be changed by it; and therefore we purposely avoid expressing any opinion as to the legal consequences of such general assignment of errors, and will proceed to consider the point mentioned in the briefs, and presented by the record, which is simply this: "that the court erred in refusing to dismiss the suit, on the motion of the plaintiffs in error, for insufficiency of the bond for costs." This motion could only have been predicated on the ground, that Dudley was a non-resident of this state, when the suit was instituted; because, if the fact was otherwise, there was no necessity for his filing such bond prior to the commencement thereof, or indeed at any time, unless ruled to give

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security for the costs of suit; and no such rule appears to have been made in this case, and, therefore, we must regard the motion to dismiss, as based upon the fact of the non-residence, and his failure to give a sufficient bond and security for the costs of suit, before it was instituted, which, under the provisions of the Revised Statutes of this state, (which were in force, and furnished the rule of decision when this motion was made), would, if admitted or established by competent legal proof, have been a sufficient ground to dismiss the suit, of which the plaintiffs in error could have availed themselves on motion. But they held the affirmative of the proposition, and the law cast upon them the burthen of proving, first, that Dudley was a non-resident of the state when he instituted the suit; and secondly, that he had failed to give sufficient security for the costs of suit, prior to the institution thereof, as required by the statute; and their failure to establish either, would be a sufficient ground upon which to justify the decision of the court overruling the motion; but no question as to the sufficiency of the security given could legitimately arise, until the fact of Dudley's non-residence was established, which could only be done by his own admission, or some other competent legal testimony. And although this fact may have been, and probably was, admitted or proved upon the hearing of the motion in the court below, yet, however the fact may have been, we are left wholly to conjecture, for the record as to that is entirely silent; and in support of this judgment, we are bound by law to presume, that it was neither admitted or proved; and if the fact was otherwise, the plaintiffs in error could, by bill of exceptions, or otherwise, have caused it to be made a part of the record, and thereby enabled this court to revise and correct the decision of the Circuit Court, if it was erroneously given to their prejudice. But this being admitted, they have thereby subjected their case to the full operation and influence of the legal presumption in favor of the judgment against them, as well as the rule which requires of every party demanding the correction of errors, or the revision and reversal of a judgment, to prove affirmatively, by the record itself, the existence of some error by which his rights are prejudiced. The principles, and the reasons, and authority, upon which they have been established and affirmed, have, on several

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occasions, been discussed, examined, stated, approved, and enforced, by this court, and their application to this case appears to us manifest and conclusive upon the question. For the fact of Dudley's non-residence is no where stated in the record, or even mentioned or recited in the bond for costs, transcribed with it. There is nothing, therefore, in the record, which even conduced to prove the fact or raise the presumption that he was a non-resident of this state when the suit was commenced. Consequently, there does not appear to have been any necessity for a bond and security for costs, and of course no question as to the sufficiency of bond for costs, if one was actually made and on file, could have legitimately arisen on the motion, and any discussion thereupon, would be idle and useless; and for this reason, we refrain expressing opinion as to the sufficiency of the bond transcribed with the record, or whether it comprises any part of it, not being expressly made a part thereof by bill of exceptions or otherwise.

Whereupon, it is our opinion, that the judgment of the Circuit Court of Chicot county, given in this case, ought to be, and the same is hereby, in all things, affirmed, with costs.

2	73
63	343
3	73
64	602

THE AUDITOR, for use of the State, against WOODRUFF and others.

ERROR to Pulaski Circuit Court.

Although the statute requires the official bond of the State Treasurer to be approved by the Governor, and that approval to be endorsed thereon, before the commission issues, or the person qualifies, or proceeds to discharge the duties of his office; yet the failure of the Governor to endorse such approval, or to approve the bond, neither creates or destroys, increases or diminishes the obligation of the contract, which, if in every other respect legally executed, is perfect.

The statute, by implication, imposes on the person whose bond is required to be thus approved, the duty of submitting it to the Executive for his approval.

The design of the Legislature, in requiring the bond to be approved by the Governor, was to provide for the public, as well as individuals, an undoubted assurance that the security is perfect, and amply sufficient to indemnify them for any loss or injury which they may sustain by failure of the officer to perform his official duties.

But the failure of the Governor to approve the bond, neither discharges the officer nor his securities. The approval is not a condition precedent, until the happening of which, the obligation of the contract remains, as it were, suspended, so that it does not attach upon the obligors. The bond became perfect by execution and delivery, as at common law.

Nor does the failure to approve operate as a defeasance or release, whereby the obligation of the contract is *ipso facto* dissolved.

In an action on such a bond, therefore, it is not necessary to aver, that it was approved by the Governor.

Where in an action of debt upon an official bond, profert is made of the *original*, and upon oyer a *copy* is filed, the defendants might have refused to accept a copy as oyer, or dispense with the production of the original, or to plead until it was produced.

But, by pleading to the action, (and a demurrer is regarded as a plea to the action), every objection to the oyer, as that it has not been granted at all, or that it has been irregularly, improperly, or insufficiently granted, is waived.

It is therefore no objection, on demurrer, that *profert* was made of the original, and oyer granted by filing a copy.

It is no objection on demurrer, that a joint bond is declared on as joint and several, for by statute, all joint bonds may be sued in the same manner as if they were joint and several.

The Legislature had the power to authorize the Auditor to sue on official bonds executed to the Governor and his successors; and the Auditor had the power on the 29th of January, A. D. 1839, to sue for the use of the state on such a bond.

In an action upon a bond, it is not necessary to aver that the bond was *delivered*.

The allegation that it is the bond of the defendant, implies a delivery.

Under the Territorial Statute, the party demurring could avail himself of any defects in the pleading demurred to, though specially set down as causes of demurrer.

When, therefore, a case comes into this court, decided on demurrer in the court below, under the Territorial Statute, if the court below sustained the demurrer, and there is any material defect, fatal on demurrer, which was not assigned among the special causes of demurrer, the decision will be sustained, though the special causes assigned were insufficient.

Oyer granted is a part of the previous pleading, and the plaintiff is bound by it as long as it remains of record in the case, even though it may have been improperly or unnecessarily granted; and the defendants can avail themselves of any defect or objection manifest upon, or produced by it.

The Auditor *against* Woodruff and others.

Where, therefore, in debt on bond, the copy of the bond, given on oyer, as it appears in the transcript of the record, shows a contract simply signed with the names of the defendants, but without any seal, or scrawl by way of seal, affixed to them, though over the names the words "witness our hands and seals," are used, the instrument given on oyer appears not to be a bond, and is variant from that sued on; and this is such a variance as is fatal on demurrer, or on error.

The court can know nothing except what appears on record, nor can they presume a diminution in such a case, and award a certiorari to supply it.

A certiorari is sometimes awarded by the court *ex-officio*, for their own satisfaction, or to enable them to *affirm*; but never with a view of supplying matter to enable them to *reverse* the judgment, nor is it ever done, unless the diminution appears from an inspection of the transcript itself.

This was an action of debt, in the name of *Elias N. Conway, Auditor of Public Accounts*, for the use of the state, against *William E. Woodruff, Chester Ashley, Edward Cross, Thomas Thorn, James De Baun, Jacob Reider, Sam C. Roane, and Peter T. Crutchfield*, for the penalty of the official bond of Woodruff, as State Treasurer, given to *James S. Conway, Governor, and his successors*, in the sum of three hundred thousand dollars. The substance of the declaration is stated in the opinion of the court.

The action was brought under the act of November 8th, 1836, by which the Auditor is authorized to sue "for any demand which the people of the state may have a right to claim." *Pamp. Acts, p. 195.* The writ issued January 29, 1839, and was served on all the defendants except *Cross* and *Roane*. At March term, 1839, the defendants craved oyer, which is stated in the record to have been "granted by filing the original," of which profert is made in the declaration. But at the same term that order was set aside, and oyer granted by filing a copy of the original.

On the 13th of March the defendants filed their demurrer to the declaration, and assigned as causes of demurrer:

First, that the copy of the bond filed did not show that the bond had been approved by the Governor as required by law;

Second, that profert is made of the *original*, and a copy is given on oyer;

Third, that the paper filed as oyer is not the *original*, nor a *certified* copy;

Fourth, that the declaration states that the defendants *jointly and severally* made the bond, whereas it is not joint and several;

Fifth, that the Auditor could not sue on the bond;

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Sixth, that there is no allegation that the bond was *delivered*.

Which demurrer was sustained, and final judgment rendered against the plaintiff, to which he sued his writ of error.

The case was argued for the state by F. W. TRAPNALL, Esq., her attorney *pro tem*.

ASHLEY & WATKINS, *contra*:

There was a general demurrer to the declaration in this case, in the court below, and the causes of demurrer were specially set down, and which were intended to operate, not as a special demurrer, technically speaking, but a written argument of the case for the judge. Those grounds of demurrer are spread out upon the record, and will answer the same purpose in the court here.

By our statute of the 19th January, 1816, and which was applicable to this case, we have adopted the common law and statutes of England, of a general nature, and not inconsistent with our laws, passed prior to the 4th year of Jac. I. *Ark. Dig. p. 130.*

By statute of the 3d July, 1807, we have substantially re-enacted the statutes of 27th Eliz., C. 5, and the 4th Anne, C. 16, in regard to special demurrers, in reference to which, Mr. Serjeant Stephen, in his treatise on pleading, p. 143, and app. N. 42, says, that the general effect of those statutes, relative to special demurrer, is well expressed by Lord Hobart, who says, in reference to the stat. 27th Eliz., C. 5: "The moderation of this statute is such, that it does not utterly reject *form*, for that were a dishonor to the law, and to make it in effect no act; but requires only that it be *discovered*, and not used as a secret snare to entrap. And that discovery must not be confused and obscure, but special; therefore, it is not sufficient to say that the demurrer is *per form*, but he must express what is the *point and speciality* of form that he requires."

But, by our statute of the 7th November, 1831, *Ark. Dig., p. 348*, it is enacted, that no special demurrer shall be filed in any civil cause hereafter to be brought in this Territory, (State,) and no objections to mere matter of form shall be taken to any declaration or plea.

Upon these statutes, two questions, involving the decision of this case, naturally present themselves to the court.

First, where the court below suffer a special demurrer to be filed, (supposing the demurrer in this case to be a special one, in the strictest sense of the term), and where the party takes issue, and goes to trial upon it in the court below, is he not concluded by his own pleading, and estopped to take any advantage of it on error?

Another question would be, what is to be the construction of these statutes, first by the term "special demurrer," as used in the act of November, 1831? Are we to infer that no special demurrer shall be allowed, which would have been cause of special demurrer at the common law, prior to the 4th year of Jac. I? If so, according to the authorities, every ground of demurrer, except for duplicity, would be general, and reached by the demurrer in this case. Second, does the statute, by that term, mean utterly to reject matters of form? Surely not. Because it is one of the fundamental rules of pleading, "that the law requires in every plea, two things, the one, that it be in matter sufficient, the other, that it be deduced and expressed, according to the forms of law; and if either the one or the other of these be wanting, it is cause of special demurrer." *Bac. Ab. Pleas and Plead.*, p. 322; *Hobart* 164. Such a vandalism would mar the beauty and science of pleading, and destroy the happy medium established by the statutes of Elizabeth and Anne, between technicality on the one hand, and irregularity and looseness on the other; and it is as true as it hath been often observed, with regard to the usages and customs of society, but more especially applicable to the science of pleading, that matter of substance is contained, though sometimes covered up and concealed, in matter of form; and where the forms are broken down and abolished, the substance is but too apt to be destroyed with it.

But if by the term special demurrer, the statute intended to exclude all demurrers *for mere matters of form*, as understood by the later English authorities, based upon the statutes of Elizabeth and Anne, then it only remains for the court to look into the several grounds disclosed by the record in this case, and *if any one of these grounds be matter of substance, it was reached by the general demurrer in this case, and the judgment of the court below is not erroneous.*

Rmoo, *Chief Justice*, delivered the opinion of the Court:

This is an action of debt, founded on the official bond of the defendant, William E. Woodruff, as the Treasurer of this State, and his securities, against all of whom the plaintiff in error, who was also plaintiff in the Circuit Court, in his official character as Auditor of Public Accounts, declares for the penalty of said bond, with a profert, but without setting forth the conditions thereof; and describes the same as a writing obligatory of the defendants, made by them on the 27th day of October, 1836, bearing date on the same day, and "sealed with their, and each of their, respective seals," whereby they "acknowledge themselves jointly and severally held and firmly bound unto James S. Conway, then and now Governor of the State of Arkansas, and his successors in office, in the just and full sum of three hundred thousand dollars, above demanded, to be paid unto the said James S. Conway, Governor of the State of Arkansas, and his successors in office; which said writing obligatory was, and still is, subject to certain conditions thereunder written." The plaintiff avers, "that he is Auditor of the State of Arkansas, duly elected, commissioned, and qualified, as the law prescribes, by means whereof, and by force of the statute in such case made and provided, the right of action hath accrued to himself, the said Elias N. Conway, Auditor of Public Accounts of the State of Arkansas, who sues for the use and benefit of the State of Arkansas, as Auditor, as aforesaid, to have, demand of, and sue the said defendants, for the use and benefit of the State of Arkansas, for the sum of three hundred thousand dollars, above demanded;" and assigns as a breach, that the "defendants did not, nor did either of them, pay unto the said James S. Conway, who is Governor of the State of Arkansas, the said sum of three hundred thousand dollars, demanded as aforesaid, or any part thereof; nor have they, the said defendants, or either of them, although often requested so to do, paid unto the said Elias N. Conway, Auditor of Public Accounts, who sues for the use and benefit of the State of Arkansas, as Auditor as aforesaid, since the right of action (by force of the statute in such case made and provided), hath accrued, as aforesaid, said sum of three hundred thousand dollars, demanded as aforesaid, or any part thereof. But this to do, they, the

said defendants, have, and each of them hath, hitherto wholly refused, and still doth refuse, and fail to pay the said sum of three hundred thousand dollars demanded as aforesaid, or any part thereof, to the damage of the said plaintiff, for the use and benefit of the State of Arkansas, five thousand dollars; and, therefore, for the use and benefit of the State of Arkansas aforesaid, he brings his suit, &c."

All of the defendants named in the declaration, except Cross and Roane, who were not found, and did not appear, entered their appearance; and at the term at which the writ was returnable, prayed oyer of the writing obligatory mentioned in the declaration which was granted, as appears by the record, first, by filing the original bond. But this grant of oyer was afterwards set aside on motion, and oyer granted, "by filing a copy of the original bond," to which there does not appear to have been any objection made; and the copy so filed, containing the condition thereunder written, is contained in the transcript of the record returned to this court with the writ of error. Oyer being thus granted, the defendant who had been thus served with process, and had appeared, filed a demurrer to the declaration, to which the plaintiff filed a joinder. Upon which, final judgment was given against the plaintiff, on the 18th day of March, 1839, to reverse which, he has brought the case before this court by writ of error.

The propriety of the judgment given upon the demurrer, is the only question presented by the record and assignment of errors, to which there is a joinder. In the demurrer, several causes of demurrer are specially stated, which have been urged by the defendants in error upon the argument in this court, and are relied upon as justifying the judgment thereupon given in their favor. They are in substance: 1st, that it does not appear that the Governor's approval of the bond is endorsed thereon, as is required by law; 2d, that protest is made of the original bond, whereas it is required by law to be delivered to the Secretary of State, and to be by him filed among the records of his office; 3d, that the oyer granted is not of the original writing obligatory, mentioned in the declaration, or a certified copy thereof; 4th, the obligation sued on, is described as being joint and several, and the writing given on oyer is joint, but not

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several; 5th, upon an obligation to the Governor, and his successors in office, suit should be instituted in the name of the Governor; and 6th, there is no allegation that the defendants delivered the writing obligatory sued on to the Governor, or the plaintiff.

On the part of the plaintiffs it is insisted, that neither of the grounds of demurrer specially assigned, are available on general demurrer at common law; and under our statute, no special demurrer can be filed, or causes which are only grounds of special demurrer at common law be regarded. The omission of the averment, that the Governor has approved the bond and endorsed his approval upon it, is not, in our opinion, fatal to the declaration, for *ex vi termini* it either creates or destroys, increases or diminishes the obligation of the contract, which, if it has been in every other respect legally executed, is perfect. The statute requiring the approval of the Governor to be endorsed on the bond, implicitly imposes on the person whose bond is required to be thus approved, the duty of submitting it to the Executive for his approval, and casts upon this high functionary the duty of exercising his judgment as to its sufficiency, in form and substance, as well as the ability of the obligors to pay the amount, for the payment of which, they have thereby stipulated and bound themselves, and of endorsing his opinion thereupon, whether he approves the same. The design of this provision was, as we apprehend, to provide for the public, as well as individuals, on undoubted assurance that the security furnished by the officer, for the faithful performance of his official duties, is perfect, and amply sufficient to indemnify them for any loss or injury which they may suffer, by reason of any failure on his part, to perform his official duties, as enjoined and prescribed by law; but if any person, notwithstanding a dereliction of the duty in this particular, should obtain a commission from the Executive, or qualify in other respects, and proceed to act, and assume to himself the authority and privileges appertaining to such office, although he might and probably would subject himself thereby to a removal from office, if the fault was his, yet to admit the principle that he, or his sureties, are discharged, or never were liable on this contract, for any official non-feasance, mis-feasance, or mal-feasance, of which he is guilty, whereby the public or any individual is injured, would, in our

opinion, be against every principle of reason, of sound morals, and of legal justice, as well as in violation of the salutary and universally admitted principle of the common law, that no man shall be suffered to take advantage of his own wrong; and notwithstanding the statute requires the bond to be approved, and the approval endorsed thereon, before the commission issues, or the person qualifies, or proceeds to discharge the duties of the office, it does not, in our opinion, create a condition precedent; until the happening of which the obligation of the contract remains, as it were, suspended, and does not attach upon the obligors. Such construction would be opposed to the principle of the common law, which holds the obligation perfect so soon as it is executed and delivered; and, in our judgment, this provision of the statute leaves these principles of the common law unchanged. Nor does the law imply, that the omission or refusal of the Governor to endorse such approval on the bond, shall operate as a defeasance or release, whereby the obligation of the contract is *ipso facto* dissolved. Such doubtless was not the intention of the law, nor are such consequences comprehended within its legitimate operation. It was, as before remarked, intended not to lessen or destroy the security of the public or individuals, in respect of any act of the officer done or omitted, by which they are or may be injured, but to guarantee to them a more perfect and ample security; and here we may be permitted to remark, that the construction which we have considered it our duty to give to this provision of the statute, does not impose any hardship on the officer or his security, as they never can be prejudiced thereby, if he does not, in violation of the law, and contrary to his duty, take upon himself the execution of the duties of the office, and therein do something prohibited, or omit to do something enjoined, by law, while, on the contrary, the interests of individuals and of the public are preserved and enforced; and we conceive a principle so immoral and so unjust, as to suffer the officer and his securities to escape merited responsibility incurred in the course of his official business, simply because he has, in violation of his duty, omitted to obtain the necessary endorsement of the Governor's approval on the bond, when he has received the full consideration for which the obligation was given, in the enjoyment of the office, and the powers,

principles, perquisites, and honors, incident thereto, cannot be maintained. If it could, the person who has thus illegally intruded himself into office, would be virtually justified in sporting away the sacred rights of others. Therefore, in our opinion, no averment that the Governor had endorsed his approval on the bond, is necessary. The second and third grounds of demurrer specially set forth, are, in our opinion, clearly untenable; for, although the plaintiff, by making profert of the original writing obligatory, instead of excusing the profert thereof, by showing that the bond was on file of record in the office of the Secretary of State, and therefore not in his possession, or subject to his control, so that he could not produce it in court; or making profert of an attested copy thereof, as he might and perhaps ought to have done, gave to his adversaries an advantage, of which they could have availed themselves by refusing to accept a copy as oyer, or dispense with the production of the original, or plead to the action until it was produced, on their prayer of oyer; yet we are unable to discover the principle upon which the profert can be considered as a defect in the proceedings, of which they can take advantage upon their demurrer to the declaration, which admits the facts as stated therein, so far as they are well pleaded; and certainly pleading the deed with a profert, in strict technical form, notwithstanding it may not be in the power of the plaintiff to produce it, as he is bound to do, when it is so pleaded, cannot, by any rule of law or practice known to us, be considered as prejudicial to, or in any manner endangering the rights of, the defendants, and, therefore, it is not an objection of which they can avail themselves by demurrer; and there is no rule of law or practice more clearly and fully established by authority, than that by pleading to the action, (and a demurrer is regarded as a plea to the action), without oyer, every objection to the oyer, as that it has not been granted at all, or has been irregularly, improperly, or insufficiently granted, is waived; and, therefore, the second and third special causes stated as grounds of demurrer are insufficient, and do not in law constitute such an objection to the proceedings, as can be taken advantage of by demurrer to the declaration.

Under the provisions of the statute passed 1st of January, 1816, *Ark. Dig.*, page 312, which were in force when this suit was instituted,

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and also at the date of the obligation sued on, suits may be brought and prosecuted on joint obligations, in the same manner as if such obligations were joint and several; and, therefore, the fourth cause specially assigned as ground of demurrer, is untenable.

The fifth objection specially stated, rests upon the assumption that the suit must be prosecuted in the name of the Governor, to whom, and his successors in office, the obligation is expressly taken and made payable; instead of the Auditor of Public Accounts, in whose name the suit is instituted. According to the principles of the common law, every action at law must be prosecuted in the name of the party in whom the legal interest in the contract is vested; but this, like every other principle of the common law, is under the control of the Legislative authority, and may be modified, changed, or abrogated, by the Legislature, at will, unless their power is restrained by the constitution. In the exercise of these constitutional powers, the Legislature of this State, by statute approved November 8th, 1836, has authorized suit to be brought "in the name of the Auditor of Public Accounts for the State of Arkansas, in the Circuit Court, for any demand which the people of the State may have a right to claim."

This amounts to nothing more than a modification of the legal remedy by suit, in cases where the money claimed would, if recovered, belong to the State. It does not in the slightest possible degree impair, or in any way affect the legal obligation of the contract, or the respective rights or liabilities of the parties to it. The remedy only is modified, and so far as we know, the authority of the Legislature to prescribe the form and direct the order of the proceeding in the courts of justice, under the Constitution of the United States, or of any State, has never been questioned or denied; provided, always, that the obligation of the contract is not thereby impaired. In the case before us, the averments in the declaration show conclusively, that the suit is by, and in the name of, the Auditor of Public Accounts, for the State of Arkansas, in his official character, and not in his private or individual right for a demand claimed for the State; and, therefore, the fifth objection is not, in our opinion, fatal to the action. The sixth objection is futile. The plaintiff in this declaration, expressly charges the writing sued on to be the writing obligatory of the

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defendants named in the declaration. Technically speaking, no instrument in writing ever becomes the deed, obligation, bond, or writing obligatory of the obligor or maker, until he delivers it as such; and, therefore, the allegation, that the instrument sued on is the writing obligatory of the defendants, implies the delivery, and is regarded by the law as equivalent to an express averment of the delivery thereof by the defendants, and it is not usual in pleading such instruments, to allege the delivery by a distinct averment.

Having thus briefly noticed and disposed of the causes of demurrer specially assigned, it becomes our duty to consider whether there are other defects, for which the plaintiff's pleading should be adjudged insufficient on the demurrer thereto; and here we will remark, that the judgment upon the demurrer was given prior to the taking effect of the Revised Statutes, and the propriety thereof must therefore be determined by the pre-existing laws, which were in force at the date of the judgment, and permitted the party demurring to avail himself of any objection to his adversary's pleading, which would be fatal to it on general demurrer at common law, though not set down specially as the ground of demurrer; and this was the uniform practice, notwithstanding the causes specially assigned were insufficient. And, therefore, if there is any fatal defect apparent upon the face of the proceeding, which would be reached by general demurrer, and this cannot be regarded as any thing different, because the law then in force prohibited the filing of any special demurrer, the judgment must be affirmed.

The record shows that oyer was granted by filing a copy of the original bond; and the oyer thus granted is to be regarded as a part of the previous pleading, and the plaintiff is bound by it as long as it remains of record in the case, and even though it may have been unnecessarily or improperly granted, and the defendants are at liberty to avail themselves of any defect or objection manifest upon or produced by it.

In this case, the copy filed as oyer, as it appears in the transcript of the record certified to this court on the writ of error, shows a contract simply signed with the names of the defendants mentioned in the declaration, but without any seal, or scrawl by way of seal, affixed

thereto, which cannot, therefore, be considered a writing obligatory; and for this reason, it appears to be a different instrument from that sued on and described in the declaration; and this is a material variance, of which advantage may be taken by general demurrer. Nor is this discrepancy in the least obviated or aided by this statement over the signatures of the defendants, "witness our hands and seals," because it is the act of the party affixing the seal, or scrawl by way of seal, and not the assertion that it is affixed thereto, (which appears upon an inspection of the writing to be untrue), that characterizes the instrument, and constitutes it a writing obligatory or deed.

This discrepancy may have originated with the copyist, who transcribed from the original the copy given as oyer, or the clerk who transcribed the same into the transcript of the copy before us. But however this may be, we cannot judicially know, nor do we in fact know any thing about it more than appears by this transcript, in which no diminution has been suggested by either party, and there is no law or rule of practice to justify us in presuming a diminution, and awarding a certiorari to supply it. A certiorari is sometimes awarded by the court *ex officio* for their own satisfaction, or to enable them to affirm, but so far as we know, it has never been done with a view to supply matter, which would enable them to reverse the judgment; and it is never so awarded by the court, unless the diminution appears from an inspection of the transcript itself, which is not the case here. We are therefore bound to regard the transcript before us as perfect, and adjudicate the case upon the record as shown by it, upon which it appears manifestly, that there is no error in the judgment. Wherefore, the judgment of the Circuit Court of Pulaski county, given in this case upon the demurrer of the defendants to the declaration of the plaintiff, ought to be, and is hereby, in all things, affirmed, with costs.

*WOOLFORD and McKNIGHT against HARRINGTON.**ERROR to Pulaski Circuit Court.*

Where a writ of summons issued from a Justice, returnable on the 16th of June, 1838, and the justice rendered judgment, by default, against the defendant, on the 17th of June, and the record does not show that the defendant appeared on the 16th, or that the case was continued, the judgment is illegal and void.

Where the entry on the Justice's docket was, that *the plaintiff* came and prayed an appeal, and offered A. B. as special bail for his appeal: whereupon A. B. came and acknowledged himself jointly bound with said *defendant* to pay the costs and condemnation of said Circuit Court; signed by the Justice; no valid appeal was taken by either party.

There can be no appeal without an order of the Justice allowing it, and a recognizance. The mere prayer of an appeal, and offer to give special bail, does not constitute an appeal. Therefore, in this case, there was no appeal on the part of the *plaintiff*.

The *defendant* neither prayed nor took an appeal—nor did he enter into a valid recognizance—nor did the Justice grant or allow him an appeal.

The recognizance is wholly void and nugatory. It contains no valid condition, it is not signed by the parties, and it was taken in a case where no appeal was either prayed or granted. It was made payable to no one, nor did A. B. ever become the security of the defendant in any recognizance.

In such a case, there being no appeal, the Circuit Court cannot assume cognizance of the cause; and any judgment which that court gives in such case is wholly illegal and void.

This was an action originally commenced by Harrington, before a Justice of the Peace. The summons issued was as follows: "*State of Arkansas, County of Pulaski, City of Little Rock, ss. The State of Arkansas to the Constable of the City of Little Rock—Greeting. Summon Israel Woolford to appear before me, a Justice of the Peace, on the 16th day of June, 1838, at my office in said township,*" &c. Signed, "J. Brown, J. P." Upon it was the following return, "executed the within by reding the same to I. Woolford in Bigg Rock township, this 9 day of June 1838. L. Z. Bullock, Const."

On the 17th of June, the Justice rendered judgment against Woolford, by default, for \$86 72 cts. debt, and \$1 52 cts. damages and costs. Then follows this entry in his docket: "June 30th, 1838. This day came the plaintiff, and prayed an appeal to the next Circuit Court of Pulaski county, and offered *Joseph W. McKnight* special

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bail for his said appeal. Whereupon, the said McKnight, came personally before me, and acknowledged himself jointly bound with the above named defendant to pay the cost and condemnation of said Circuit Court. *Test. J. Brown, J. P.*"

The case thus went to the Circuit Court, and at October Term, 1838, an order, in substance, as follows, was made there. That the parties came, and the appellant failed to prosecute his suit; wherefore the judgment of the Justice was *affirmed*; and it was considered that Harrington recover of Woolford and McKnight \$86 72 cts. debt, and \$3 24 damages, and costs before the Justice and in the Circuit Court. Woolford and McKnight then sued their writ of error.

FOWLER, for plaintiff in error.

Judgment having been rendered *by default in both courts below*, there was nothing done by the appearance of Woolford, or otherwise, to cure the defects, either in the process or service, or in the rendition of the judgment, consequently the whole proceeding is open for the inspection and revision of this court. The proceedings before a Justice of the Peace (his court being one of undoubted *inferior* and *limited* jurisdiction,) should show clearly that he had jurisdiction of the cause. In this case such jurisdiction is left utterly vague, uncertain, and contradictory. Brown no where shows whether he was a Justice of any *Township in Pulaski county*, or of the *City of Little Rock*, jurisdictions which are wholly different. If a *Township* Justice, the fact should appear; if a *City* Justice, which would circumscribe still more his jurisdiction, it is the more necessary. The writ, then, is utterly defective; it is directed to the *City Constable*, by one who does not show that he has authority, *as a City Justice*, to issue such mandate. The writ is returnable to his office in "*said township*," no township having been previously named; whereas it should have been made returnable in said *City*, to give jurisdiction as a *City Magistrate*, which he must have been, to be authorized to direct a writ to said Constable. If a township Magistrate, as we would reasonably be led to believe from the fact of the writ being made returnable in "*a township*," he could not direct a writ to the *City Constable*. If said writ was properly directed to said *City Constable*, there is no legal service,

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because such Constable could only execute process *within* said city. The return is that the writ was served in "*Big Rock township*," and the conclusive inference arises that the service was not made *within* the city, or the fact would have been so returned. Therefore, judgment was rendered against Woolford by the Justice, and also by the Circuit Court, without any legal service upon Woolford, or any appearance by him to cure the want of service.

There is another insurmountable objection to said judgment, as is contended for the plaintiffs in error, in this, that the judgment before the Justice was rendered on the *seventeenth* day of June, when the writ was made returnable on the *sixteenth*; and nothing appears to justify its being rendered on a different day from that of the return. On this point, no pretence can be raised from the transcript, that Woolford had notice of the time and place of trial and judgment.

The transcript also shows that it was *Harrington* who took the *appeal*, and that McKnight, became *his security*, not Woolford's, and, therefore, the judgment of the Circuit Court is erroneous. It could only have been properly rendered against Woolford *alone*, or Harrington and McKnight, *jointly*.

All of which is respectfully submitted.

WATKINS & HEMPSTAD, *contra*:

The objections to the proceedings in this case are purely technical. They do not reach the justice or merits of the case, nor is any principle of law evolved by the plaintiff's assignment of errors, which is not inseparable from the record, or which can be considered abstractly.

The objections taken by the plaintiffs, in their assignment of errors, may be briefly enumerated as follows:

First, to the irregularity in the appeal;

Second, to the want of proper service in the suit before the Justice;

Third, that the judgment in the Circuit Court was improperly rendered against McKnight, the security in appeal, as well as against Woolford, the principal, and that that judgment ought to have been for the costs of the suit alone, and not for the debt and damages.

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By reference to the *Dig. p. 374, 375; sec. 57, 59, 60, 61*; all defects and irregularities, if any such there be, were cured by the appeal, and could not be taken advantage of in the Circuit Court. See *Dig. tit. Just. of the Peace, sec. 60*. See also our *Statute of Jeofails, Rev. Stat. tit. Practice of Law, sec. 118, 119*.

Besides, as to the process, this court has decided in several cases, that where a party appeals, it amounts almost to a contempt of Court, for him to set up in opposition to the judgment in the appellate court, that there was no sufficient service upon him in the court below.

But if this were not the rule of law, the record in this case, shows, that the parties appeared in the Circuit Court by their attorneys, that the appellant failing to prosecute his appeal, there was judgment by *nil dicit*, against Woolford and McKnight, his security in appeal.

The right of appeal is a sacred right, guaranteed by law, and is not to be trifled with, so as to enable a party to create delay, so that the debt may be lost, and then shuffle off the responsibility as, we may presume, one of the plaintiffs in error in this case is endeavoring to do.

As to the propriety of the judgment, it being against Woolford and McKnight his security, for debt, damages, and costs, see *sec. 59, 61*. That judgment is correct and proper. See also the last clause of *sec. 55*, in force, and applicable to this case.

It is to be inferred from their assignment of errors, that the plaintiffs in error contend that the court ought to have simply affirmed the judgment of the Justice, and *remanded* the case to the Justice, there to be proceeded on, &c., and that the Circuit Court ought only to have given judgment for the costs in that court.

On the contrary, the Circuit Court went on to give judgment upon the merits of the case, for a larger amount than the judgment of the Justice, against McKnight as well as against Woolford, for the debt, damages, and costs, as by law the Circuit Court might well do.

As to the objection that the original summons was returnable on the 16th June, 1838, and that the judgment appears to have been rendered on the 17th of June, without any continuance of the cause appearing to have been made, we contend that because this matter, if erroneous, has not been assigned for error by the plaintiffs, the court

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here will not inquire into it. Among a number of minute matters which they have assigned for error, this one is omitted.

But such an error in the judgment of the Justice, does not invalidate the judgment of the Circuit Court in this case.

Because, first, the appeal from a Justice of the Peace to the Circuit Court, is nothing in the nature of a writ of a error or certiorari, but affords the parties a new trial *de novo*, upon the merits. The parties stand upon the record plaintiff and defendant, as they did before the Justice, nor indeed, was there any mode under the Digest, by which the appellant if defendant, could be prevented from setting up a new or different defence if he had one, and which he had either failed or neglected to set up at the trial before the Justice. And the statute concerning appeals, contemplates throughout, that no objections shall be taken upon such new trial, to want of form in the proceedings before the magistrate. The maxim of *ignorantia laicorum*, &c., need not travel in search of an application, while there are Justices of the Peace in Arkansas.

Now the record in this case shows that the parties appeared in the the Circuit Court, the appellant as well as the appellee, and the appellant failing to prosecute his appeal, the Circuit Court went on to render judgment *de novo*, upon the merits, which judgment was based upon the writing sued on, there of record before the court.

It is true the record contains the formal expression that the court for the default of the appellant, considered that the judgment of the Justice be affirmed, but the court went on in the next clause of the record to render a new judgment upon the merits, and for an amount larger than the judgment of the Justice.

There is nothing then in the record, or in the assignment of errors, by which it can be made to appear that the judgment of the *Circuit Court* in this case is erroneous.

LACY, J., delivered the opinion of the Court:

It is as much a principle of natural justice, as of legal right, that no one can be made a party to any judicial proceeding, without he has some notice thereof, and an opportunity offered him of defending his interest; and it is equally clear that he cannot be bound by any

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judicial process, judgment, or decree, to which he has not been legally constituted a party on the record. The summons in the case before us, issued from the Justice's Court, on the first of June, A. D. 1838, and was made returnable on the 16th day thereof. It was properly executed on the 9th day of June, A. D. 1838, but the record wholly fails to show that the defendant appeared on that day to the writ, the 16th day of June, or that the cause was continued by consent or application of the parties. On the 17th day of June, judgment was entered up by default against the defendant, Israel Woolford, by the Justice's Court. It is most manifest that this judgment is illegal and void, for it was entered up on a day not authorized by the summons, and inconsistent with its mandate, and consequently, on a day the defendant was not bound to appear or be in court. The record does not show that he appeared agreeably to the summons on the 16th day of June, and as it is silent on that point, no legal inference can be drawn in favor of such fact, or that he waived his right to the notice, and voluntarily came in and defended the suit. Judgment was entered against him by default, but as he was never lawfully notified to appear on the day, or at the time it was given, of course he could not be guilty of any legal default; and, therefore, the judgment before the Justice's Court, was entirely insufficient and void. It is clearly evident from an inspection of the record, that no appeal was ever prayed or taken either by the defendant or plaintiff in the action, from the judgment of the Justice's Court. The first part of the entry stated that the plaintiff prayed an appeal, and offered to give special bail, but it wholly fails to show that the court ever entered an order allowing such appeal, or that he ever entered into the recognizance required by law. He has done no single act, required by the Statute regulating the practice in such cases, and consequently as the court never granted him an appeal, it cannot be pretended, that upon his part, there was a valid appeal taken in the case. His mere prayer for an appeal, and offering to give special bail, can in no possible point of view, be considered as constituting a valid appeal. There must be an action of the court on the subject, as well as of the party, and a compliance with the necessary requisites of the Statute to constitute a valid appeal.

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We will now see whether the defendant ever prayed or took an appeal from the judgment of the Justice's Court. That he did not is perfectly evident. The record does not even state that he prayed an appeal, much less that he took one. The latter part of the entry states, that "the said McKnight came personally before the Justice, and acknowledged himself jointly bound with the above named defendant, to pay the costs and condemnation of the Circuit Court. Does this constitute a valid appeal on the part of the defendant, Woolford? Most assuredly it does not. In the present instance the defendant neither prayed or took an appeal, nor did he enter into a valid recognizance before the Justice of the Peace, agreeably to the provisions of the Statute, in such cases made and provided. The court neither granted or allowed him the benefit of an appeal, nor did the defendant do any act whatever, amounting to an appeal; as the record unquestionably proves. The supposed recognizance in this case is wholly void and nugatory in every respect. It contains no valid condition, it was not signed by the parties, and it is taken in a case where there was no appeal either prayed or granted. It was made payable to no one, nor did Joseph W. McKnight ever agree to become bound as the security of Israel Woolford in any recognizance. The act regulating appeals from the Justices of the Peace to the Circuit Court, declares "that if the defendant appeals, he with one or more approved securities, shall enter into a recognizance before the Justice, acknowledging themselves to be indebted to the plaintiff in a sum sufficient to cover the matter in dispute, and all costs, upon condition that, if the judgment of the Justice be affirmed by the court, the defendant will pay the amount of such judgment and costs," which recognizance shall be subscribed by the party appealing and his securities, and tested by the Justice. See *Dig.* 373, *sec.* 55. It is clearly true, that the defendant did not in one single instance comply with any of these indispensable requisites; and, consequently, there was no appeal prayed for, or taken by him from the judgment of the Justice's Court. This being the case, it necessarily follows, that the Circuit Court had no jurisdiction of the cause, and of course could pronounce no valid judgment in the premises. In cases coming up on appeals from the decision of Justices of the Peace, the jurisdiction of

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the Circuit Court attaches and grows out of the appeal prayed and taken. And if there is no appeal, the Circuit Court cannot rightfully assume cognizance of the cause. And so it has been ruled in this Court, in the case of *Smith vs. Stinnett*. It unquestionably follows from these positions, that the judgment of the Circuit Court was wholly illegal and void, because it neither possessed or acquired jurisdiction of the subject matter in dispute, consequently the judgment and decision of the court below must be reversed with costs, the cause remanded to be proceeded in agreeably to the opinion here delivered, which is, that the Circuit Court dismiss the case for want of jurisdiction, and transmit the original papers back to the Justice's Court for further proceedings therein, according to law and the instructions here given.

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APPLICATION for Writ of Injunction.

The writ of injunction is a judicial writ.

The Supreme Court possesses no constitutional power and authority to issue any other writs than those expressly enumerated in that clause of the Constitution which provides that "the Supreme Court shall have power to issue writs of error and superseatas, certiorari and habeas corpus, mandamus and quo warranto, and other remedial writs, and to hear and determine the same;" or such as are necessarily implied in that enumeration.

This clause limits the Supreme Court, in the exercise of *original* jurisdiction, to cases to which the writs therein *specially* enumerated would apply; and the power to issue "other remedial writs," embraces only such other writs as may be properly used in the exercise of appellate powers, or the power of control over inferior or other courts, expressly granted by the Constitution.

The power to issue writs of injunction, to stay proceedings at law, is not conferred upon the Supreme Court, by the expression "other remedial writs," used in this clause of the Constitution.

The Supreme Court can issue no writ which it cannot also hear and determine: and, therefore it can issue no writ of injunction.

Nor can the Supreme Court derive any authority by implication to issue a writ of injunction from the provisions in the Constitution, that "it shall have a general supervising control over all inferior and other courts of law and equity."

The object of this provision was to prevent a conflict of jurisdiction among the several judicial tribunals which might otherwise arise and endanger the entire plan and form of the government.

The Supreme Court, possessing the attributes of supremacy, must and does possess the power to govern, and to enforce its own authority and decrees: and if the writs enumerated in the Constitution, are not sufficient for that purpose, it may frame new ones, to cause its mandates to be respected and obeyed.

When the Supreme Court has once prescribed the rule of action on any given question, the rule itself, being sovereign and supreme, must be implicitly followed and obeyed by all the inferior judicial tribunals. To disobey or question its authority would be to commit a clear and palpable violation of Constitutional duty.

But before the Supreme Court can lay down any governing rule of action for the inferior and other courts of law and equity they must either have acted, or positively refused to act. The Supreme Court cannot act in advance of the other tribunals.

The Circuit Courts have the whole original chancery jurisdiction in the State. Issuing a writ of injunction is a proceeding in chancery, and the Supreme Court can issue no such writ, without assuming and exercising a portion of the chancery jurisdiction allotted to the Circuit Courts.

Where jurisdiction is given to the Supreme Court, the practice may be regulated and prescribed by the Legislature; but the Constitutional existence, organization, and jurisdiction of that court can, in no essential point or manner, be changed or altered by the Legislature.

The act, therefore, which gives to the Supreme Court the power to grant writs of injunction to stay waste and proceedings at law throughout the State, is a clear and palpable violation of the Constitution, and therefore null and void.

Isaac N. Jones, ex parte.

This was an application for a writ of injunction to stay certain proceedings at law in Lafayette Circuit Court. The matter having been decided on the Constitutional question as to the power of the court to grant the writ, it is unnecessary to state the facts set up in the bill.

LACY, *Judge*, delivered the opinion of the Court:

This is an application to the Supreme Court to issue a writ of injunction. At a previous day of the present term, the complainant Isaac N. Jones exhibited his bill in chancery to be relieved of a judgment at law obtained against him by James W. Irwin, endorsee of James Giles, in the Lafayette Circuit Court, and he claimed to be entitled to the benefit of a writ of injunction, to stay the proceedings, by virtue of an act of the General Assembly, approved March 5, 1838, which declares that the Supreme Court, or any Judge thereof in vacation, shall have power to grant injunctions to stay waste and proceedings at law throughout the State. *Rev. Stat. p. 452.* It is admitted that this act confers upon the Supreme Court the power to grant writs of injunction in a case properly made out; provided, it be constitutional. And the question now is, as to the constitutionality of the act under consideration. On one hand it is contended it is constitutional. On the other it is asserted to be a clear and palpable violation of the Constitution. Its constitutionality, or its unconstitutionality, we will now proceed to discuss and determine. Before, however, we do so, it is proper to determine the nature and character of a writ of injunction, and the objects and purposes to which it is generally applied. An injunction is a judicial writ, issued out of a court of chancery, for the purpose of staying waste or oppressive and unjust judgments at law. The party applying for it must show some equitable circumstance which will entitle him to the benefit of the writ: and that consists generally, if not universally, in the fact that a court of law has no jurisdiction of the case; or that if it has jurisdiction, it cannot administer full, certain and adequate relief. When these facts are established to the satisfaction of the Chancellor, he is empowered with authority, as the party is remediless at law, to make an order to stay the judgment and proceedings therein had, so that a

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a court of equity can take cognizance of the case, and decree equitable and complete redress in the premises.

The Constitution, in establishing and organizing the Supreme Court, declares "that it shall have appellate jurisdiction only, co-extensive with the State, and under such restrictions and regulations as may from time to time be prescribed by law. It shall have a general supervising control over all inferior courts of law and equity. It shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto, and other remedial writs, and to hear and determine the same. *Art. 4, sec. 2. Const. Rev. Stat. p. 33.* Here, then, the powers of the Supreme Court are given, limited, and defined; and to the exercise of the powers thus granted and specified, they are expressly confined by the Constitution. They can neither enlarge or diminish their constitutional power or jurisdiction by a fair and just construction of the grant expressly or impliedly. They cannot refuse to take cognizance of the particular class of cases assigned to them by the Constitution, nor can they assume any jurisdiction incompatible with its paramount authority and will. The obligation to exercise a jurisdiction that is conferred, and to refrain from exercising it where it is denied, is of equal obligatory force. By an analysis of the powers conferred upon the Supreme Court, as prescribed by the Constitution, it will be readily perceived that all its constitutional jurisdiction, as derivative from the grant of its creation, and nearly all of its powers, are strictly of an appellate character. The Convention first designed to make it what in truth it is—a Court of Error and of Appeals, whose practice might be regulated and prescribed by Legislative enactments; but whose constitutional existence, organization, and jurisdiction, could in no essential point or manner be changed or altered by the Legislature. This proposition seems to our minds to be clearly deducible, not only from the particular clause of the Constitution we are now considering, but from the general frame and nature of the government itself, as organized and established by the Convention. Then, it clearly follows, from these plain and obvious principles, that the Supreme Court possesses no constitutional power and authority to issue any other writs than those expressly enumerated and

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embraced in the Constitution, or such as are necessarily implied and contained in that enumeration. It certainly cannot be pretended that the writ of injunction is included in that enumeration, for the express terms and words of the grant, conclusively negative any such idea. Is it then impliedly embraced in the clause in question? This clause has been fully examined, and its meaning ascertained and declared, in the case of *the State vs. Chester Ashley and others*, on a motion for information in the nature of a quo warranto. The Chief Justice, in delivering the opinion in that case, holds the following explicit and emphatic language; "We will now examine what jurisdiction or power this court can derive from the terms 'other remedial writs,' as used in the Constitution. The terms here used are general, and their application is left indefinite. Did the Constitution intend thereby to authorize the court to issue every writ of a remedial nature known to the laws, and to hear and determine the same? If they did, their declaration that the court shall have appellate jurisdiction only, "except in cases otherwise directed by this Constitution," as well as their special grant of power to issue certain enumerated writs, each of which is of a remedial nature, is wholly unmeaning, if not positively absurd. And, besides that, it would produce a direct conflict of authority between the several judicial tribunals, and involve them in the utmost confusion. It would destroy every vestige of harmony in the whole system, and virtually repeal every other grant of judicial power made by the Constitution. It would draw to this forum original jurisdiction co-extensive with the State of every civil controversy; for it must be observed that in respect to the sum or amount involved, there is no restriction whatever imposed by the Constitution in any cause in which the court can exercise original jurisdiction: therefore, if it can, under any authority derived from this general grant, take original jurisdiction of any case, it may of all cases falling within the same general class. These consequences are clearly not within the objects and intention of the Convention, but in opposition to both. And it is a rule founded on the dictates of common sense, and admitted by all jurists, that in construing a Constitution or fundamental law of Government, no construction of a given power is to be allowed, which plainly defeats or impairs its avowed objects. If, therefore, the words

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are fairly susceptible of two interpretations according to their common sense and use, one of which would defeat one, or all, of the objects for which it was obviously given, and the other of which would preserve and promote all; the former interpretation ought to be rejected, and the latter to be held the true interpretation.

The terms, "other remedial writs," as before remarked, are indefinite in themselves, and may embrace a greater or less number in proportion to the object and purposes to which they are intended to be applied; and they might be applied to almost every purpose, with the single qualification that it shall be in a proceeding of a remedial nature, as contra-distinguished from proceedings of a criminal or penal character; which, by the language used, are expressly included. The terms used must, therefore, receive such a construction as will promote, rather than defeat, the objects of the grant, or the general objects of the Convention. The context, and every other part of the whole instrument, which relates to the organization of the judiciary, and the distribution of the judicial power must be looked to in determining the power given by the general indefinite grant. These have all been carefully and critically examined by the court, and from them it appears satisfactorily, that it was the intention of the framers of the Constitution to limit and restrict the Supreme Court in the exercise of original jurisdiction to such cases as the writs therein specially enumerated would apply, and that the power to issue other remedial writs, intended to embrace only such other writs as might be properly used in the exercise of appellate powers, or the power of control over inferior or other courts, expressly granted by the Constitution. And such, in every point of view in which they can be considered, is, in the opinion of this court, the only legitimate, true, consistent, sensible, and practicable interpretation which they can receive." If the principle here laid down be true, and that it is we have not the least doubt, then the power to issue a writ of injunction to stay proceedings at law is certainly not conferred upon the Supreme Court by the terms, "other remedial writs," used in the Constitution. We have certainly no power to issue any writ that we cannot, after its emanation, try and determine; for the words of the Constitution are explicit and precatory upon the point. After the enumeration of the writs prescribed

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by the instrument, the Constitution declares "that the Supreme Court shall have power to hear and determine the same." We cannot issue any writ without having jurisdiction to try the same; for, if we could, then we would be at liberty wholly and totally to disregard the latter part of the section, and consider it a mere nullity. This we have no right to do, without violating the first and primary rules of all just and fair interpretation. The whole clause, or section, must be taken together and made to stand, if they are not irreconcilably opposed to each other. This is a maxim of the common law in the construction of all legal instruments. Suppose, for example, we should issue the writ now applied for, could we then take cognizance of the cause, and try the matter in dispute between the parties. If so, the Supreme Court can draw to themselves all original jurisdiction in cases where injunctions would lie, and thus, by this simple and easy process, they would be enabled to oust the Circuit Courts of all original chancery jurisdiction, which is expressly given to it by the Constitution, until otherwise prescribed by law. This, it is evident, would be a clear and palpable violation of the Constitution, reaching and abrogating the letter and spirit of the instrument, and its general objects and designs. Let us see now whether the power to issue the writ now applied for, is impliedly included in the terms "the Supreme Court shall have a general and superintending control over all inferior and other courts of law and equity." What, then, is the true construction to be put upon these terms? The object of inserting them is obvious and manifest. It was to prevent a co-existent conflict of jurisdiction among the several distinct judicial tribunals which might, otherwise, arise and endanger the entire plan or form of the government. The Convention clothed the Supreme Court with all the necessary power that was requisite to combine the subordinate parts, in order to enable them to maintain a concert of co-operation, and a harmony of action, throughout the entire judicial system.

This principle they deemed highly important, and every way essential for the maintenance of constitutional liberty and the due administration of public justice. Hence, the Convention gave them, by express grant, a supervising control over all inferior courts of law and equity. As the court of error and appeals possesses the attribute of

Isaac N. Jones, *ex parte*.

supremacy in the system, of course, it must, and does have, power to govern, and to enforce its own authority and decrees. If the writs enumerated in the Constitution are not sufficient for that purpose, it may form any new one to cause its mandates to be respected and obeyed, and when it has once prescribed the rule of action on any given question, the rule itself being sovereign and supreme, must be implicitly followed and obeyed by all the inferior judicial tribunals. To disobey or question its authority, would be to commit a clear and palpable violation of constitutional duty. Before, however, the Supreme Court can lay down any governing rule of action for the inferior and other courts of law and equity, they must have either acted on the subject, or have positively refused to act. They must first have done some unlawful, illegal act, or they must have omitted, either rightly or wrongfully, to have acted at all. The Supreme Court cannot act in advance of the action of the inferior tribunals, for, if it could, it might assume, by indirection, a constitutional jurisdiction not warranted by the instrument, but expressly forbidden by its will. Whenever the inferior courts have first acted, then their action, if erroneous, is liable to be revised and corrected by the Supreme Court. If these positions be true, then the Supreme Court can derive no authority, by implication, to issue writs of injunction, from the terms "they shall have a general superintending control over all inferior and other courts of law and equity," as used in the Constitution.

This view of the subject is strengthened and fully sustained by the sixth section of the seventh article of the instrument, which declares, "until the General Assembly shall deem it expedient to establish courts of chancery, the Circuit Courts shall have jurisdiction in matters of equity, subject to an appeal to the Supreme Court, in such manner, as may be prescribed by law." The Legislature has not thought proper, as yet, to establish courts of chancery; and, of course, the Circuit Courts still retain primary jurisdiction in matters of equity, subject to an appeal. It surely cannot be denied, that issuing a writ of injunction is a matter in equity or chancery proceeding; then, if it is such a proceeding, it belongs by constitutional grant, in the first instance, and primarily, to the Circuit Courts and, consequently, the Supreme Court cannot assume or exercise any portion of the constitutional

Isaac N. Jones, *ex parte*.

jurisdiction assigned to those tribunals, without a clear and manifest violation of the instrument. These principles we regard as fundamental, for they lie at the very foundation of the whole judicial system, and they cannot be departed from without putting in imminent hazard our entire plan or form of government. Considerations like these have induced this court to be extremely cautious in assuming original jurisdiction in doubtful cases, or in such as were not expressly or clearly included in the grant of the Constitution. If the principles we have laid down be correct, then it necessarily follows, that the act of the Legislature, giving to the Supreme Court power to grant injunctions to stay waste and proceedings at law, is a clear and palpable violation of the Constitution, and therefore null and void. The Constitution of our State is the supreme paramount law, unless it be repugnant to the Constitution of the United States; and, therefore, any legislative acts or provisions inconsistent with its authority, and irreconcilable with its will, must be taken and held for nought. This being the case, the application for the writ must, therefore, be dismissed without prejudice or costs.

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 preme Court cannot assume jurisdiction over it, and for the reason of the constitutional

WOOSTER *against* CLARKE.

ERROR to Conway Circuit Court.

Where the declaration contained five counts, two on writings obligatory, one on a promissory note, and two on simple contract debts, and *nil debet* was pleaded to the whole declaration, the plea was bad on demurrer.

Where, at the same time the pleas of *payment* and *set-off* were put in, and the plaintiff demurred to the plea of *nil debet*, and filed replications to the pleas of *payment* and *set-off*, tendering an issue to the country in each, to which the defendant does not add a *similiter*, the plaintiff is not warranted by law, upon his demurrer being sustained, in taking judgment by *nil dicit*.

Judgment, by *nil dicit*, may be rendered, where the defendant, after he has appeared to the action, has not pleaded at all, or not within the time prescribed by law or the rules of the court; or not in a proper manner; or where he has pleaded some plea not adapted to the nature of the action, or to the circumstances of the case, or the like.

But where he has pleaded, within the time prescribed, and in a proper manner, pleas adapted to the nature of the action and circumstances of the case; and which, if determined in his favor, upon an issue properly formed therein, would bar the action, or so much thereof as the pleading purports to answer; and to which the plaintiff has replied, merely negating the facts pleaded, and concluding to the country, a judgment by *nil dicit* is not warranted by law.

In such a case, there is an issue upon the record without the *similiter*, which is mere matter of form, and may in all such cases be added by the plaintiff, subject to be struck out by the defendant if he wishes to demur.

The *similiter* is mere matter of form, and if not implied in the "*&c.*" added to the replication, at least the duty is imposed on the plaintiff of adding it, and *trying* the issues, instead of taking judgment by *nil dicit*.

Where the judgment was for "the debt in the declaration mentioned, to wit, \$2478 74 cts. debt, and \$780 77 damages, to bear interest at 8 per ct. until paid; and also \$491 16 cts. debt, and \$103 11 cts. damages, to bear interest at 6 per ct. until paid, together with costs, the judgment was irregular and illegal.

The act of Nov. 3, 1836, makes it the duty of the court to adjudge interest at any rate specified in the instrument sued on, not exceeding 10 per cent., and to ascertain the rate of interest to be recovered, and the time from which and until which the same shall be computed and recovered, and express the same in the judgment.

But in this case it is uncertain on what sum or sums the interest is to be computed. A grammatical construction of the judgment would make it computable on the *damages* only, which would be wholly illegal; and if on debt and damages both, it is equally illegal.

Even if computable on the debt alone, still the judgment is uncertain, irregular, and for too much; because, the interest, which is computed to the date of the judgment, and adjudged as damages, would, by virtue of the Statute, bear interest from the date of judgment at 6 per cent. per annum, which would be also illegal.

This was an action of debt, commenced by Lorenzo N. Clarke against Sheldon Wooster. The declaration contained five counts—two on writings obligatory, one on a promissory note, and two on simple contracts.

The defendant pleaded *nil debet*, *payment*, and *set-off*. The plaintiff demurred to the first plea, and filed a general replication, concluding to the country, to each of the others. At November Term, 1838, the record states that the demurrer was sustained, and the replications being unanswered, and the defendant saying nothing further in bar, &c., judgment was rendered for \$2478 94 cts. debt, \$780 87 cts. damages, "to bear interest at the rate of eight per cent. until paid," and also \$491 16 debt, and \$103 11 damages, "to bear interest at the rate of six per cent.," &c., and costs. There are some other matters on the record which were discussed in the arguments, but not being noticed in the opinions, they are omitted. To the judgment Wooster sued his writ of error.

TAYLOR, for plaintiff in error:

First. *Nil debet*, may be pleaded in an action on simple contract. 1 *Chitt. Plead.* 476, 477, 478. The Statute does not allow the party to plead any plea that denies the execution of the instrument sued on. But the averment of the non-existence of the debt at the time of the plea pleaded, which is all the plea does aver, is consistent with the valid execution of the instrument.

Second. To take judgment without answering pleas which go to the merits is erroneous. If plaintiff take judgment without answering the matter alleged against him it is a discontinuance. 1 *Chitt. Plead.* 511, 512; 1 *Saund. Rep.* 28 a. 1, 2, 3; 1 *Bos. & Pul.* 411; 1 *Hen. Bl.* 645; 6 *Taun.* 606; 6 *John.* 63; 6 *Cranch* 126; 11 *John.* 583.

Third. Judgment must be for one entire amount, and cannot be for several distinct amounts. The suit must be for one entire individual cause of action, and the judgment must correspond in awarding the recovery of one entire demand. 3 *Black. Com.* 393, 394, 395, 396: see the authorities there referred to.

Fourth. The original cause of action is merged in the judgment, and the rate of interest afterwards is governed, not by the terms of the contract, but the general law allowing interest, which is at the rate of six per cent. The judgment being for more is erroneous. 1 *Saund.* 92, v. 2; 2 *Strange* 733; 1 *Chitt. Plead.* 472. When the cause of action is once determined, the contract ceases to have any

Wooster *against* Clarke.

operative effect, and, this principle embraces every thing that might have been litigated by the parties. 1 *Blackf. Rep.* (Indiana), 360. See the *Stat.* on interest.

TRAPNALL & PIKE, contra:

That the plea of *nil debet* was held bad on demurrer, is no error. Two of the counts in the declaration are on bonds; and a plea going to the whole declaration, and bad for part, is bad for the whole.

The replications put in to the pleas left the *onus probandi* where the pleas placed it; on the defendant. After the demurrer was sustained to the first plea, the defendant saying nothing further, nor offering evidence to sustain his plea, judgment went against him by *nil dicit*. It is true that when the plaintiff's replication concludes to the country, he may himself add the *similiter*. But we have no issue-books in our practice, nor any making up of issue and delivery to the other party, and taking rule to rejoin, &c., as in the English practice. Wherever a party is in default, judgment goes, upon the calling of the case. The object of allowing the plaintiff to add the *similiter* in England, was to enable him to make up the issue-book, and serve it on his adversary. But by our practice one party is required to do no act for the other. When the case is called, each party is bound to make up his pleading to an issue. If either fails to do so he is in default.

The judgment is sufficient. The plaintiff is allowed by law to take judgment, bearing interest at the rate fixed in the writing, if not higher than 10 per cent. The two bonds here bear interest at 8, and the note at 6 per cent. The judgment therefore had to be rendered so that different portions should bear interest at different rates.

Ringo, *Chief Justice*, delivered the opinion of the Court:

By the assignment of errors, to which this is a joinder, the following questions are presented. 1st. Did the court err in overruling the plea of *nil debet*, on the demurrer of the plaintiff to said plea. 2d. Was the plaintiff in the Circuit Court entitled by law to a judgment by *nil dicit*. 3d. Is the judgment, as given and entered in favor of the

Wooster against Clarke.

plaintiff below, warranted by law. 4th. Ought the judgment to have been set aside on the motion of Wooster.

These questions will be examined and disposed of in the order in which they are stated.

Two counts of the declaration are founded on writings obligatory, and the plea purports to answer the whole declaration. There can be no doubt that *nil debet* is not a good plea to so much of the action as is founded on writings obligatory, and the rule is equally well settled that a plea, bad in part, is bad for the whole, and therefore the plea in question, was properly overruled by the court on the plaintiff's demurrer.

The record proves, as before stated, that the replications of Clarke to the pleas of payment and set-off, tender an issue to the country in which Wooster failed to join by adding the "*similiter*," and for this default, judgment was given against him by *nil dicit*, and the question is, is this such a default in pleading as in law justifies the plaintiff below in proceeding to take judgment against the defendant as by *nil dicit*. The general rule is, that such judgment may be entered in cases where the defendant after he has appeared to the action, has not pleaded within the time limited by law, or the rules of the court, or in a proper manner, or where he has pleaded some plea not adapted to the nature of the action, or circumstances of the case, or the like. 2 *Arch. Prac.* 8; 1 *ib.* 120; *Tidd's Prac.* 506. But where the defendant, as in this case, has pleaded within the time prescribed, in a proper manner pleas adapted to the nature of the action, and circumstances of the case, which if determined in his favor upon an issue properly formed, thereupon, would bar the action, or so much thereof as the pleading purports to answer, and to which the plaintiff has replied merely negating the facts pleaded by the defendant, and tendering an issue to the country, such judgment is, in our opinion, not warranted by law; because, there is an issue formed upon the record, without the *similiter*, which is mere matter of form, and may in all such cases be added by the plaintiff, subject however to be struck out by the defendant if he wishes to demur to the replication. *Arch. Prac.* 125, 126. An issue is defined to be a single, certain, and material point issuing out of the allegations and pleas of the plaintiff and

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defendant, consisting regularly of an affirmative, and negative, to be tried by twelve men. *Co. Litt.* 126; *Bac. Ab. Pleas and Plead. G.* If this be the true definition of an issue, and that it is there can be no doubt, the facts affirmed by Wooster, and denied by Clarke, certainly constituted an issue which was material and capable of being tried by a jury, and the omission to add the *similiter*, which might as well have been added by the plaintiff as the defendant, surely cannot be regarded otherwise than as a merely formal defect; if, indeed, it is not, as it has been held in England to be, implied in the "&c." added to the pleading. *Sayer vs. Pocock*, 1 *Cowper* 408. It is certainly true that the omission to add the *similiter*, was originally holden to be matter of substance not to be aided or amended. 1 *Str.* 641. But the contrary has been uniformly ruled since the decision of the case in *Cowper* above cited, in which in delivering the judgment of the court, Lord Mansfield says, "one is ashamed and grieved that such objections remain. They have nothing to do with the justice of the case, but only serve to entangle without being of the least aid in preventing irregularity. Without considering whether it is within the *Stat. of Jeofails* or not, it is best to amend to avoid a writ of error, and there are these grounds which satisfy me that the matter in the case is amendable. 1st. That it is an omission of the Clerk. 2d. I will in this case adopt the reasoning of Lord Coke, and construe "&c." every necessary matter that ought to be expressed. *Co. Litt.* 17 *b.* 3d. By amending, the court only make that right which the defendant himself understood to be so by going down to trial." And, notwithstanding the facts in the case of *Sayer vs. Pocock*, are not in every respect similar to the facts of the case before us, the principle upon which the amendments were admitted in the former, applies with equal force to the latter, regarding the *similiter* as mere matter of form, implied in the "&c.," adopted and added to the replication, and thereby imposing on the plaintiff the necessity of trying the issues so formed in some manner authorized by law. We are, therefore, of the opinion that the plaintiff, instead of entering the judgment as by *nil dicit*, or for want of a plea, was bound by law to have proceeded to a trial of the issues on record in the case, the addition of the *similiter* being only matter of form, which he ought to have supplied before the case was

tried, as the defendant had omitted to do it. But the omission thereof would not of itself vitiate the verdict or justify a judgment by *nil dicit* in any form.

The judgment is uncertain in itself, and does not pursue or conform to the provisions of the Statute, approved November 3d, A. D. 1836, by virtue of which interest may be adjudged at any rate specified in the instrument sued on, not exceeding ten per cent. per annum, according to the stipulations of the contract: besides which the judgment is for too much. The act above cited makes it the duty of the court, in all cases, to ascertain the rate of interest to be recovered, and express the same in the judgment. Instead of conforming to the provisions of the Statute, the court, as appears by the judgment before us, computed the interest which had accrued on some of the demands specified in the declaration at the date of the judgment, and then proceeded to give judgment for such demands, as well for the debt in the declaration mentioned, and the interest for the amount computed thereon as aforesaid, as for so much damages sustained by reason of the detention of such debt, to bear interest at the rate mentioned in the judgment; which does not ascertain with sufficient certainty whether the interest specified in the judgment shall be computed from the several sums adjudged to the plaintiff, or upon either the debt or damages only; and if, upon either separately, it is not defined with sufficient certainty which shall bear the interest, or the time from which, or until which, the same shall be computed and recovered, according to the provisions of the Statute above quoted. A grammatical construction of the language used in the judgment, would properly restrict the computation of interest especially adjudged, to the damages only, which would be wholly illegal. Again, by disregarding the grammatical construction of the sentence, the language used might, and probably would in the common acceptation thereof, have to be regarded as giving interest upon the several sums adjudged as debt and damages, in which event, the judgment would be for too much. But suppose it applied alone (which, in our opinion, it cannot by any fair and reasonable construction) to the sums adjudged as debt, still the judgment would be, not only informal and uncertain, but for a larger sum than is authorized by law upon the premises, as set forth in the judg-

Wooster against Clarke.

ment, because the interest computed to the date of the judgment, and adjudged as damages for the detention of the debt would, by virtue of the provisions of the Statute, bear interest at the rate of six per centum *per annum* from the date of the judgment until paid. The whole amount of the accruing interest upon which is, therefore, by this judgment illegally recovered of the defendant, as without this the plaintiff recovers the full amount of interest as stipulated in the contract which is all that the law will suffer him to have.

The view which we have taken renders it wholly unnecessary for us to examine the fourth question presented by the assignment of errors, as the judgment must be reversed for the reasons and upon the grounds before stated, and no question thereupon can arise on the return of the case to the Circuit Court, and, therefore, we express no opinion upon it.

Whereupon, it is the opinion of this court, that the judgment of the Circuit Court of Conway county, given in this case, ought to be, and is hereby, reversed, annulled, and set aside with costs, and the cause remanded to said Circuit Court, for further proceedings therein to be there had, according to law and not inconsistent with this opinion.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF ARKANSAS,
In January Term, A. D. 1840, being the sixty-fourth year
of our Independence.

JOHN CLARK against WILLIAM C. GIBSON.

ERROR to Chicot Circuit Court.

Where it is assigned for error that the court below erred in overruling a motion to dismiss for want of a bond for costs; in order to obtain a reversal, the record must establish the non-residence of the plaintiff. If it does not, the presumption is in favor of the decision below.

The want of bond for costs, where the plaintiff is a non-resident, may now be taken advantage of by motion: but the law now allowing that to be done, does not change the nature of the defence, or prescribe the time within which the defendant shall be at liberty to avail himself of it.

It is, therefore, still matter in abatement only, whether interposed by plea or motion; and if, instead of availing himself of this defence at the proper time, the defendant interposes a defence to the merits, he waived the objection altogether.

And the rule is the same whether he pleads generally to the merits, or demurs, before or after his motion to dismiss. In either case he waives the objection.

If the writing sued on be not made a part of the record by oyer or otherwise, it is no part of the record, though a copy of a writing agreeing with that sued on is found among the papers. And it makes no difference that oyer was regularly craved, if the record does not show that it was granted.

This was an action of debt brought by *Gibson* against *Clark*, on a writing obligatory for the sum of \$2,000. The declaration was in technical form, and sufficient. A bond for costs was filed, in the condition of which it is stated that Gibson was a non-resident. The defendant craved oyer, but there was no showing on the record that his prayer was either granted or refused; although the transcript contained a copy of a bond for \$2,000, executed by Clark and others.

Clark against Gibson.

The final entry in the case, and the only material one after the prayer of oyer, was, that the defendant moved to dismiss for want of a sufficient and legal bond for costs, which was overruled. He then demurred to the declaration, the plaintiff joined, and the demurrer was overruled, and judgment was rendered for the plaintiff by *nil dicit*. To this judgment the defendant below sued his writ of error.

TRAPNALL & COCKE, for plaintiff in error:

The declaration describes the joint and several obligation sued on in this case, as a several obligation only; and the only question presented by the record, is, is there such a variance between the allegation and evidence, that the plaintiff does not show, by his pleading that he is entitled to a judgment.

Chit. p. 271, lays down the rule to be that a trifling variation in setting out a contract, a record, or written instrument is *fatal*: because it does not appear that the contract given in evidence is that on which the plaintiff declares.

Starkie, upon the same subject, *p. 1520*, says, it is in the nature of things impossible that a transaction detailed upon the record, can be identical with the one proved, if the proof vary in the slightest particular, be it in its own nature ever so insignificant.

These plain and simple rules, which are of universal application, are fully illustrated in the case of *Bristow vs. Wright, Doug. 665*, and established by Lord Mansfield in an unanswerable argument. *Chit. in pages 274, 275, 276, and 316, 317*, has compiled a number of cases, exemplifying the same principles, under almost every combination of circumstances.

From all which, it will appear, that every variation as to date, sum, names, or nature of obligation, is a matter of description, is invariably held to be fatal to the pleading.

In this case the statement of the joint obligation is essential to the correct description and identity of the instrument. Although the obligors are liable in a joint as well as in separate actions, yet the joint and several promises cannot be separated in describing and distinguishing the obligation sued on.

A joint and several obligation occupies a middle ground between

Clark *against* Gibson.

joint obligations and several ones, and whilst it has the features of each, it is entirely of a distinct and different nature, and a description of a several obligation, would no more comprehend a joint obligation than a joint and several one.

And this will be seen, not only by referring to the forms of Chitty, where the contract is always described as joint and several in suits against the several obligors, but in a great number of cases decided in the New-York and Kentucky Reports upon the same subject.

ASHLEY & WATKINS, *contra*:

No question can arise as to the sufficiency of the bond for costs. It is in conformity with *Steele and McCampbell's Digest*, under which the actions were commenced, and the bonds for costs given. Even if the bonds are defective, the objections were not taken in apt time; but, after the defendant had attempted to make himself a party to suit, by entering an appearance for the purpose of demurring. And, in any event, the provision in *Steele and McCampbell, tit. Judicial Proceedings, sec. 5*, requiring a bond for costs in the case of a non-resident plaintiff is only declaratory without any sanction, except such as the Circuit Court, by a rule upon the party, may impose. And this court has decided the want of a bond for costs to be a defect which may be cured at any time during the progress of the cause, and according to the rule established by this court in cases arising under the old *Digest*, the objection was not aptly taken, because it should have been by plea in abatement, and not upon motion: nor is there any evidence going to show this court, or the court below, that the defendant in error was a non-resident, either at the time of the motion being made, or at the commencement of the suit; so the court below erred only in entering the motion to dismiss, instead of striking it off the files.

The record in these cases presents nothing but a regular and valid judgment by *nil dicit*. True, the defendant below, after the grant of oyer, attempted to demur for a variance. But, as I understand the statutory provisions concerning demurrers, if sufficient appeared in the proceedings to enable the court below to give judgment, it was

Clark *against* Gibson.

bound to do so, according to the very right of the cause, unless the party demurring had specially set out in his demurrer, any such defect or imperfection as would have been ground of general demurrer at the common law. *Rev. Stat. tit. Prac. at Law, sec. 60.* The plaintiff in error did not set out any defect or imperfection in his demurrer, and the question whether such defect or omission in the demurrer, can (in the face of the positive Statute) be waived by any act or consent of the parties, does not arise in this case, because, the defendant in error did not join in the demurrer, or in any way make himself a party to it. So the court below acted properly in wholly disregarding such a demurrer, and in omitting to render any judgment upon it.

As regards the merits of the case, sufficient appears upon the declaration and the writing obligatory given in oyer, to entitle the plaintiff below to judgment, in other words the declaration is a good one, and the action is rightly brought.

The writing obligatory sued on in this case is in terms a joint and several one. The general principle on this subject is that a *contract* written, or instrument, should be declared on according *its legal effect*. 1 *Chit. 334; Stephen on Plead. 432; Gould's Plead. 182;* and the cases there cited. According to its legal effect then, the writing obligatory in this case, was as much the individual obligation of the plaintiff in error as if he alone had executed it. The parties may be sued jointly or separately, the note may be, and usually is, stated to have been made by the defendant alone. *Chit. on Bills, 7th ed. 346.* When a contract is joint and several, in an action against one it is not necessary to notice the other. 2 *Chit. Plead. (7th Am. ed.) 116;* and see, also, *Gould's Plead. 206, sec. 69; ib. 278, sec. 114.*

Quere. Is not a grant of oyer wholly inoperative unless the defendant avails himself of it to some substantial purpose, as to demur specially for a variance, or to set out the deed in pleading.

This the defendant below did not do, and can the court here notice any thing in this record save a plain declaration upon a several writing obligatory. The appearance of the defendant in a valid manner and a valid judgment by *nil dicit*.

Clark against Gibson.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The plaintiff by his assignment of errors, to which there is a joinder, presents but two questions. 1st. Did the court err in overruling his motion to dismiss the suit for the want of a sufficient bond for costs? 2d. Did the court err in overruling his demurrer to the plaintiff's declaration? The fact that the plaintiff was a non-resident of this State when the suit was commenced, is not established by any thing contained in the record, and, therefore, upon the principles stated and acted upon by this court, in the case of *Smith, et als., vs. Dudley, ex'r of Talbot, dec'd*, decided at the late term thereof, we are bound by law to presume that the decision of the court, refusing to dismiss the suit on that ground, was correct. In addition to which, it has been held by this court, in the case of *Means vs. Cromwell*, 1 *Ark. Rep.* 247, that the failure of a non-resident plaintiff to file bond and security for costs, is matter in abatement only, which may be taken advantage of by plea, or motion made in pursuance of the provisions of the Statute in such case provided, and although that decision, so far as it relates to the taking advantage of this objection to the proceedings by motion, was governed by statutory provisions since repealed; yet the Statute, approved March 3, 1838, *Rev. Stat.* 201, under the provisions of which this motion was made, notwithstanding it changes materially the law on this subject, as to the manner of interposing this defence by motion, does not in any respect change the nature of the defence itself, or prescribe the time within which the defendant shall be at liberty to avail himself of it; and, therefore it must be regarded still as matter in abatement only, and whether interposed by plea or by motion made under the provisions of this Statute above cited, when the plaintiff is a non-resident of this State at the time of the institution of his suit, must be made in the order, and within the time prescribed by law, for pleading in abatement any personal disability of the plaintiff to sue; and if the defendant, instead of availing himself of this defence at the proper time, interposes a defence to the merits of the action, the law regards him as waiving the objection altogether, upon the same principle, by which the defendant is precluded by law from insisting upon any other matter of defence in abatement, if he omits to take advantage of it in the established order of pleading,

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or pleads to the action itself, in bar thereof, either before or after presenting the matter in abatement: and upon this principle the defendant below must be considered as waiving upon the record, his motion to dismiss, when he demurred to the declaration, and his adversary joined in the demurrer. The law regards a general demurrer to the declaration as a defence to the action itself, in bar thereof, and therefore does not permit him to assign as error any thing in the decision or judgment of the court given upon said motion; for it appears that he has, by his own voluntary act, waived this matter of defence, and rested his defence upon matter in bar of the action itself.

The second question presented by the assignment of errors, although argued at the bar, and mainly relied upon by the plaintiff, that there is a material variance between the obligation set forth in the declaration, and the one exhibited upon oyer, is not presented by the record before us, because it does not appear therefrom that oyer of the writing obligatory sued on, though regularly craved, was ever granted; and notwithstanding a joint and several writing obligatory, purporting to have been made and executed by the defendant below, and three others, whose names are not mentioned in the declaration, corresponding in every other respect with the one therein mentioned and described, appears in the transcript of the record before us, it does not in any manner authorized by law appear to have been made a part of the record of this case; and, therefore, this court in adjudicating the case, is not at liberty to regard it as a part of the record thereof. Divested of which, the record presents simply a declaration in debt, upon a writing obligatory, legally sufficient and technically formal in all its parts, the demurrer to which was correctly overruled by the court.

Wherefore, it is the opinion of this court, that there is no error in the judgment of the Circuit Court given in this case for the defendant in error, and that the same ought to be, and is hereby, in all things affirmed with costs.

DAVIES against GIBSON.

ERROR to Chicot Circuit Court.

In order to reverse a judgment for erroneous overruling by the court below of a motion to dismiss for want of a bond for costs, the non-residence of the plaintiff must be established by the record.

Such a motion cannot be made after a defence in bar is interposed.

Where the record states that the defendant "demurred to the plaintiff's declaration;" but no written demurrer appears on the record, nor are any special causes of demurrer set forth, although the court was not bound to receive such a demurrer and admit it upon the record; still, if placed on the record, it is equivalent to a declaration of the defendant, made in open court, that he will go no further in the case, because his adversary has not shown sufficient matter against him.

And when admitted on the record, the court is bound to regard it as a general demurrer.

But such a statement on the record as to the pleading of any matter of fact required by law to be specially pleaded, would be disregarded.

A joinder in demurrer is mere matter of form, and may be filed at any time; and, therefore, where the defendant demurred to the declaration, to which demurrer the plaintiff filed no joinder, and the court gave judgment for the plaintiff without regarding the demurrer, it must be presumed that the court overruled the demurrer, and adjudged the declaration sufficient in law.

If the final judgment rendered, is, upon the whole record, authorized by law, no court exercising appellate jurisdiction over the subject, will reverse or disturb it, though errors and irregularities in the previous proceedings, not affecting the merits of the case, may appear in the record.

If, therefore, the proceedings as to the demurrer in this case were irregular, or even illegal, and if no direct adjudication was ever made upon it; still if a good cause of action, stated in legal form, appears upon the declaration, the defendant below could not have been prejudiced by such irregularity, illegality or omission, and therefore can derive no benefit therefrom, to the injury of the other party, and against the justice of the case.

The provisions in the Revised Statutes, in regard to demurrers and amendments after demurrer, do not essentially differ from those contained in *St. 27 Eliz.* and 4 & 5 *Anne*, taken together, and the adjudications upon the latter will generally apply to such cases as arise under the former.

The party demurring is required specially to express in his demurrer the particular defect or imperfection which vitiates the pleading; and is prohibited from so expressing in his demurrer any matter which is only cause of special demurrer at the common law; while it is enjoined upon the court to amend any defect or imperfection not so expressed in the demurrer.

When the pleading, so amended, exhibits sufficient matter to enable the court to give judgment according to the right of the cause, judgment must be given thereupon, without regarding any defect or imperfection in the pleading.

But this general rule is to be understood with this exception, that the court cannot amend as to matters of fact which are not in any manner stated by the parties. When, therefore, the facts stated cannot, under any form of stating them, be made to exhibit a legal cause of action or ground of defence, the court is bound to decide the matter against the party, whose pleading is so defective, because he does not show any legal right to the thing in demand.

The declaration in this case being sufficient, and the defendant not having specified in his demurrer in what particular the pleading is defective, the court cannot regard such defect or imperfection, but is bound to amend the same.

The question therefore of variance between the writing given on oyer, and the declaration, cannot arise in this court.

Davies against Gibson.

This was an action of debt, commenced and prosecuted by *Gibson* against *Davies* in the Circuit Court of Chicot county, upon a writing obligatory, which is described in the declaration as the single obligation of the defendant. At the term to which the original writ was returnable, *Davies* appeared and cravedoyer of the supposed writing obligatory in the declaration mentioned, which was granted by filing a copy thereof. The record then states that the defendant by his attorneys demurred to the plaintiff's declaration, "when, on motion of *Gibson*, the case was continued until the next morning." The record then shows that *Davies*, on the next day, "moved the court to dismiss this suit for want of sufficient bond for costs having been filed in this case, which was overruled," and without taking any notice of the demurrer previously mentioned, which does not appear to have been withdrawn or joined, or in any manner disposed of by the court, shows a judgment, by *nil dicit*, given against *Davies* for the debt in the declaration mentioned with interest and costs of suit.

The oyer given as above stated of the obligation sued on is as follows. "\$2,000. On or before the first day of February, one thousand eight hundred and thirty-eight, we promise jointly and severally to pay William C. Gibson or order two thousand dollars for value received. Witness our hands and seals this 15th day of March, 1836.

W. B. PATTON, [L. s.]

BEN PATTON by J. Clark [L. s.]

JOHN CLARK [L. s.]

A. H. DAVIES [L. s.]

The argument in this case was the same as in *Clark vs. Gibson*, page 110.

Ringo, Chief Justice, delivered the opinion of the Court:

The plaintiff, by his assignment of errors to which there is a joinder, questions the decision and judgment of the court, in; 1st. Overruling his motion to dismiss the suit, on the ground that no sufficient bond and security for costs was filed by the plaintiff below, at or before the commencement of the suit: 2nd. Giving final judgment for the plaintiff below, without adjudicating upon, or in any manner disposing of his demurrer to the declaration: 3d. Giving final judg-

ment for the plaintiff below, his declaration being insufficient in law to warrant or justify such judgment.

The motion to dismiss does not appear to have been supported by any evidence establishing the fact of Gibson's non-residence at the time of the commencement of the suit, and it certainly is not a fact the existence of which the law will presume from any thing contained in the record; besides which, the motion to dismiss appears to have been made after a defence in bar of the action was interposed, and therefore the question in every aspect in which it can be viewed, is within the principle heretofore stated and recognized by this court as applicable to this case, in the case of *Clark vs. Gibson*, decided at the present term, and other cases there cited; therefore, the Circuit Court does not appear to have erred in refusing to dismiss the case on said motion.

The second question presents more difficulty. The record simply states that the defendant "demurred to the plaintiff's declaration," but no demurrer, either formal or informal, is transcribed with the record; and it does not appear that any demurrer specifying or specially setting forth any particular defect or imperfection in the declaration, or any other proceeding in the case, as mentioned in the 60th section of the act regulating the practice of law, approved December 18, 1837, *Rev. Stat. Ark.* 627, which was in force when this proceeding was had, was ever filed or otherwise interposed. Nor does it appear that the court, or the plaintiff below, regarded this statement in the record as a defence to the action, for the latter never joined in it, and the former pronounced final judgment for the plaintiff, without even noticing it. The only rational conclusion appears to us to be that the court regarded this statement in the record as a mere nullity, and not entitled to any consideration whatever, or held the declaration sufficient in law to maintain the plaintiff's action against the defendant, and therefore gave judgment for him notwithstanding the demurrer, and this imposes upon us the necessity of determining whether the record before us shows any defence which the court was bound to notice. *Chitty* in his *Treatise on Pleading*, says *vol. 1, p. 700*, "a demurrer has been defined to be a declaration that the party demurring will go no further, because the other has not shown sufficient mat-

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ter against him," and "in point of form no precise words are necessary in a demurrer, and a plea which is in substance a demurrer, though very informal, will be considered as such; and it is a general rule that there cannot be a demurrer to a demurrer." 1 *Chit. Plead.* p. 705. Other definitions not differing in substance or effect, though stated in different language, may be found, which we do not deem it necessary to cite in this place, as in our opinion the single term "demurred," as expressed in the record before us, comprehends as much as would be comprehended by the language used in defining the term "demurrer," and must be regarded as equivalent to a declaration of the defendant made in open court, and placed upon the record of the court, that he will "stay" or "go no further" in the case, because his adversary has not shown sufficient matter against him; and as no precise words, or special form are required in a demurrer, and there can be no demurrer to a demurrer, the court, after the statement had been admitted on the record, was bound to regard it as a general demurrer to the declaration, notwithstanding it would not, in our opinion, have constituted such a demurrer as the court was bound to receive and admit on the record, and the court would have been completely justified in disregarding and excluding it from the record altogether in the first instance; and, to prevent misconception on this subject we will remark here, that when the defence comprises matter of fact instead of law, such statement or notice of the plea on the record must, as a general rule, be disregarded. At least, such would be the case where the matter of defence relied on must, by law, be pleaded specially; and, although the demurrer in this case could not be legally overlooked or disregarded, either by the plaintiff below or the court, yet inasmuch as the joinder in demurrer is merely matter of form, and "may be filed at any time," by virtue of the fifth section of the Statute before cited, *Rev. Stat. Ark.* 627, and as the court proceeded to give final judgment for the plaintiff below, notwithstanding the demurrer to his declaration, we are bound by law to presume that the court overruled the demurrer, and adjudged the declaration sufficient in law to entitle the plaintiff to a recovery against the defendant upon the facts as stated therein. Otherwise the court could not legally have given judgment in favor of the plaintiff below, as it

appears to have been given in this case; and this devolves upon us the necessity of considering and determining whether the final judgment as given is, upon the whole record, authorized by law. If it is, the rule is well settled that no court exercising appellate jurisdiction over the subject will reverse or disturb it, though errors and irregularities in the previous proceedings not affecting the merits of the case may appear in the record, and this rule applies with peculiar force to the case under consideration; because, if it be conceded that the proceeding, as to the demurrer, was irregular or even illegal, and that no direct adjudication was ever made upon it; still if a good cause of action, stated in legal form, appears upon the declaration, the defendant below could not have been prejudiced by such irregularity, illegality, or omission; and, therefore, as he is not damnified thereby, the law will not suffer him to derive any advantage therefrom, to the injury of the other party; and against the justice of the case, and this view of the subject accords with the provisions of the 119th section of the Statute above cited, *Rev. Stat. Ark.* 636; and, therefore, the only question remaining to be decided is, whether the declaration is sufficient in law to entitle the plaintiff below, to a recovery upon the facts as therein stated and set forth, notwithstanding the demurrer of the defendant.

The plaintiff in error insists that there is a material variance between the writing obligatory described in the declaration, and the one given on oyer, and that such variance may be taken advantage of by general demurrer to the declaration. The defendant in error contends that the variance, if any, consists only in the omission to mention in the declaration the names of certain persons, by whom the writing obligatory exhibited on oyer, purports to have been sealed, as co-obligors with the plaintiff in error, and as the obligation is several, as well as joint, there is no misdescription of it in the declaration, and that the non-joinder of the co-obligors must be taken advantage of by plea in abatement, if it can be taken advantage of in any manner; but it is not, and never was ground of demurrer to the declaration. To determine this question correctly, it is necessary before we apply to it the rules and principles of the common law, to ascertain the operation and effect of the statutory provisions in force, when the demurrer was interposed and final judgment rendered in the case. The 60th section

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of the Statute before cited, *Rev. Stat. Ark.* 627, declares that "when any demurrer shall be filed in any action, and issue joined therein, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear, without regarding any defect or other imperfections in any process or pleading, so that sufficient appear in the pleadings to enable the court to give judgment according to the very right of the cause; unless such defect or imperfection be specially expressed in the demurrer, but no defect or imperfection shall be set out in any demurrer, that would only be cause of special demurrer at common law." And the 61st section of the Statute provides that "if a demurrer be filed in any action, the court shall amend every such defect or other imperfection in any process or pleading in the preceding section mentioned, other than those which the party demurring shall express in his demurrer." These provisions do not essentially differ from those contained in *Stat. 7 Eliz.* 5, and *Anne* 4 & 5; *Anne* 16, taken together; and therefore adjudications upon the latter, will generally apply to such cases as arise under the former; for their general object and design is the same; that is, to simplify the proceedings and pleadings in actions at law, by disregarding and amending all objections thereto, which are only calculated to subvert justice, or to embarrass or delay the final adjudication of the matter; yet requiring the parties to set forth in their proceedings and pleadings respectively, enough to enable the court to adjudicate the matter according to law and the very right of the cause; or, in other language, to award to each litigant his legal right as it regards the matter under adjudication; but to prevent surprise, and disembarass legal proceedings of every exception, not affecting the real merits of the case. The party demurring is required to express in his demurrer specially, the particular defect or imperfection in the case presented by his adversary, which, as he conceives, vitiates the proceeding or pleading demurred to, and he is expressly prohibited from so expressing in his demurrer any matter which is only cause of special demurrer at common law, while it is enjoined upon the court to amend every defect or imperfection in the process or pleading which the party demurring does not so express in his demurrer. And when the pleading so amended exhibits sufficient matter to enable the court to

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give judgment according to the very right of the cause, judgment must be given thereupon, without regarding any defect or other imperfection in the process or pleading. But this general rule as prescribed by the statute in order to carry into complete effect the paramount object and design of the law as before stated, as well as to prevent it from depriving parties of their legal rights, instead of assisting them in the investigation to ascertain them, must be understood with this exception, that the court cannot amend as to matters of fact, which are not in any manner stated by the parties, because it is a universal maxim that the law never requires of any person an impossibility, and the court cannot by possibility know what facts do, or do not exist, and therefore, when the facts stated, cannot under any form of stating them, be made to exhibit a legal cause of action, or ground of defence, the pleading cannot be maintained, notwithstanding this particular defect is not specially expressed in the demurrer; and the court, in enforcing the law, by proceeding to give "judgment, according as the very right of the cause and matter in law shall appear" is bound to decide the matter against the party, whose pleading is so defective, because he does not show any legal right to the thing in demand, and the Legislature cannot be presumed to have intended to establish a rule by which the estate of one person shall be adjudged to another, who cannot exhibit and establish a paramount legal right to it; because such act would be not only contrary to natural justice, but to the whole spirit of our institutions; and such would, in our opinion, be the effect of the general rule as prescribed by the statute, without the exception before stated, which is fully authorized and clearly indicated upon the face of the statute itself, which requires that sufficient shall appear in the pleadings to enable the court to give judgment according to the very right of the cause; and, therefore, according to the letter as well as the principal object and design of the statute, when sufficient does not so appear, judgment must be given against the party whose legal right to the matter under adjudication is not shown by the pleadings.

Having thus ascertained the rule by which the case is to be determined, we have only to apply it to the case before us, and discover whether the plaintiff below has stated and set forth in his pleading

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such facts, as in any form in which they can be presented, legally entitle him to a recovery against the defendant.

The declaration states with a profert, a writing obligatory of the defendant, bearing date on the 15th day of March, 1836, by which he bound himself to pay to the plaintiff, on or before the first day of February, 1838, the sum of \$2,000; and alleges that the same remains wholly unpaid by the defendant. These facts are sufficient in law to entitle the plaintiff below to a recovery of that sum, with interest, of the defendant, and they are all pleaded in the declaration with ample certainty, and in strictly legal form; but if they were not so pleaded, the defendant below has omitted to specify in his demurrer in what particular, if any, the pleading is defective or imperfect, and therefore the court is not at liberty to regard such defect or imperfection, but is bound by law to amend the same and give judgment according to the very right of the cause, as the Circuit Court in this case appears to have done.

Wherefore, in the opinion of this court, there is no error in the proceeding and judgment of the Circuit Court of Chicot county, in this case, for which the same ought to be reversed; and therefore the said judgment is hereby in all things affirmed with costs.

DILLARD against NOEL.

The defendant in error filed his motion to dismiss this case upon the ground that the plaintiff in error was not a resident of the State, and that he had filed no bond for costs in this court, before suing out a writ of error.

Motion overruled, and held by the court that the 34th chap. of the Revised Statutes did not require any such bond to be filed in the Supreme Court.

CHILDRESS against FOSTER.

Held in this case that a party might appeal to the Supreme Court from the decision of the Circuit Court, upon filing the necessary affidavit, and without entering into recognizance—and that the recognizance was necessary only to enable the appeal to operate as a supercedeas.

WEBB against HANGER & WINSTON.**ERROR to Chicot Circuit Court.**

Unless it appears affirmatively upon the record that the defendant was regularly brought into court, in accordance with the statutory provisions regulating the mode of bringing actions; or that he consented to proceed without process or notice, the court can exercise no jurisdiction over the subject matter.

This objection is valid at every stage of the cause, and cannot be cured by any subsequent proceeding.

Where the record states, in the judgment rendered, that "it appears to the satisfaction of the court that the defendant has had due notice of this motion" for judgment; the record does not show that he had any legal notice, either actual or constructive, of the proceedings against him.

A court cannot reinstate upon the record a judgment, the original of which has been lost or destroyed.

At the May term, 1839, of the Circuit Court of Chicot county, the plaintiffs in the court below, asked leave to reinstate on the record of that court a judgment at law previously obtained by him at the April term thereof in 1838, upon the ground that the original entry was lost or destroyed. The record then recites "this day came the plaintiffs, by their said attorneys, and it appearing to the satisfaction of the court, that a judgment had been entered at the last April term of this court, which was begun and held on the first Monday after the fourth Monday of April, 1838, in favor of the said plaintiffs against the said defendant, for the sum of eight hundred and eleven dollars and fifty-three cents damages, being the amount of said bill of exchange, damages and interest up to the rendition of said judgment, together with four dollars protest fees, and costs of suit, and it appearing further to the satisfaction of the court that the record of said judgment has been lost or destroyed, and that the defendant has had due notice of this motion; therefore, on motion of the said plaintiffs, by their said attorney, it is ordered by the court that the said plaintiffs have leave to have their said judgment reinstated on the record of this court, and that they have execution herefor for the debts, damages, and costs, aforesaid, and that the said defendant be in mercy, &c."

ASHLEY & WATKINS, for plaintiff in error:

The matters assigned for error in this case, come within the rule established by this court at the July term, 1839, in several cases brought up from the Chicot Circuit Court, similarly situated to the present one.

Indeed, the plaintiff in error would labor under some difficulty in showing in this case any proper final judgment or decision to be complained of, were not the whole preceeding as vexatious as nugatory, and did it not expressly authorize the issuance of an execution upon some previous alleged judgment and carry with it by intendment the costs of that proceeding.

This reinstatement of the judgment, as it is termed, is clearly erroneous, chiefly because it sets every thing afloat, and as a precedent would be dangerous and oppressive in its tendency.

This proceeding is wholly nondescript: it is not an action of debt upon a judgment, nor a scire facias to revive a judgment; which last, however, it somewhat resembles, but it no where appears upon the record sent here, that a scire facias, or any notice in the nature of a scire facias, ever was served upon the plaintiff, or that any such judgment as the one proposed to be revived or reinstated ever was rendered.

Where the records of a court are lost or destroyed by accident in the absence of any legislative provision to guard against or remedy such a calamity, I can conceive of no mode by which a court can restore them to existence. In such cases a party plaintiff must individually suffer some vexation and delay. But clearly his remedy is to sue as it were entirely *de novo*, and by the same rule the defendant would not have it in his power to verify any plea of former recovery.

While the *lis pendens* is unsettled, where the cause of action in any manner depends upon a lost deed or other written evidence, by law, the loss of the instrument may be accounted for, and its contents established by parol testimony; but where the same controversy is rendered final in judgment, by a wise and ancient maxim of law, the record of that judgment is a thing of such solemnity and dignity, that it cannot be impeached or proven but by itself. Its destruction is never contemplated by law, its validity can only be rebutted by pre-

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sumption of law arising from lapse of time, and its contents cannot be explained by any parol testimony short of tradition or immemorial usage.

DICKINSON, *Judge*, delivered the opinion of the court:

The plaintiff assigns as causes of reversal, that the defendant in the court had no legal notice of the proceedings against him, &c. 2nd. That the Circuit Court had no authority to reinstate the judgment. An objection was made on the part of the defendants in error that the judgment of the Circuit Court was not of a character which could be considered final. Whatever doubts we may have entertained upon the subject, the order for execution clearly shows that the Circuit Court considered their action final. Such being the fact, we consider it the duty of the court to look into the record and test the validity of its proceedings.

That it is indispensably necessary that the defendant should have had some legal notice, either actual or constructive, of the cause of action against him, or have waived it by his personal appearance, there can be no doubt or question; and it must be conceded that merely naming a person and styling him a party in the writ or pleadings alone, without giving notice of the proceeding, will not render a judgment valid against him. In the present case, Webb made no defence in the Circuit Court; nor, does it appear from the record, that he had any legal notice, either actual or constructive, of the proceedings against him; nor that he waived such notice by his voluntary appearance. It is a settled principle that unless it appears affirmatively upon the record that the defendant was regularly brought into court in accordance with the statutory provisions regulating the mode of bringing actions, (see *sec. 3 to 13, p. 619, Rev. Code*,) or that he consented to proceed without process or notice, the court could not exercise any jurisdiction over the subject matter. This objection is valid at every stage in the cause, and cannot be cured by any subsequent proceeding. And the rule, that want of notice is fatal, is uniformly sustained by all the authorities. See *Ormsby vs. Lynch, Littell's Sel. Cas. 303; Borden vs. Fitch, 15 J. R. 121*. The second assignment, that the court below could not rightfully reinstate on the record a

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judgment the original of which was lost or destroyed, has been already decided in the case of *Webb vs. Estill*, at the last term, and as we think upon correct principles.

We are of opinion, therefore, that the judgment of the court below is absolutely null and void, and that the same ought to be reversed with costs.

The same decision was made in the case of *Pettit vs. Hanger & Winston*.

HENRY S. ROACH against ALBERT G. SCOGIN.**ERROR to Hempstead Circuit Court.**

Where a demurrer to the declaration was filed, in which no special causes of demurrer were assigned, it is to be considered in this court as a general demurrer; and the only question is whether the plaintiff has stated and set forth a sufficient cause of action, to legally entitle him to a recovery.

In such case, where the declaration contains two counts, each on a promissory note executed Feb. 1, 1839, by which the defendant acknowledged himself to owe and be indebted to the plaintiff in the sum of \$338 84 cts., in good cash notes, and alleging that the same remain due and wholly unpaid, it is sufficient: and it was error to sustain a demurrer to it.

This was an action of assumpsit, brought in the Court below, by *Roach* against *Scogin*. The declaration contained three counts. The first stated that *Scogin*, on the first day of February, 1839, made his promissory note, and then thereby acknowledged himself to owe *Roach* \$338 84 cts., in good cash notes, and delivered the note to *Roach*, whereby he became liable to pay him the sum of money in the note specified, according to the tenor and effect of the note, and promised to do so. The second count was to the same effect. The third count was on an account stated, and a promise to pay the same sum in good cash notes: and the general breach is that the defendant had failed to pay the several sums of money in good cash notes, or otherwise.

To this declaration the defendant filed his general demurrer, not assigning any causes of demurrer, in short on the record, in which the plaintiff joined, and the demurrer being sustained, *Roach* sued his writ of error.

TRIMBLE, for plaintiff in error:

From the declaration and the agreement of the attorneys who were engaged in the case, it seems that the objection to the declaration was that there was no special demand and refusal laid in the declaration. The declaration contains the usual general request, but no

Henry S. Roach *against* Albert G. Scogin.

special demand, with time and place. On the part of the defendants it is contended that the declaration does not contain a sufficient cause of action. The writing on which the declaration is founded is not part of the record, and the whole dispute is referred to the declaration. The plaintiff relies on the following grounds to reverse the judgment of the court below. That the court below sustained the defendant's demurrer to the plaintiff's declaration, and gave judgment on demurrer for the defendant. The plaintiff insists that a special demand was not necessary, and if there be one good count in the declaration, as the demurrer was general, and to the whole of the declaration, that the judgment must be reversed, and for this, relies on the following authorities, 1 *Chit.* 288, *note 1*. In an action on a promissory note for a certain sum, payable in goods of one description or other, at the election of the promisee, within eight days after date, it was held unnecessary for the plaintiff to aver an election or notice to the defendant who became liable immediately on the expiration of eight days. Where the payment or duty to be performed is to be on request, the request is parcel and part of the contract, a special request is necessary, 1 *Saund.* 33 *b.*; *Harden* 87, 88. Where the day of payment is fixed by the contract, the law fixes the place, and it is incumbent on the defendant, by the plea, to show that he was ready at the time and place. On a contract acknowledging a debt due without postponing the time of payment it must be known and judicially noticed by the court, that the debt was payable and demandable immediately and without delay, 1 *Bibb* 164, *Payne vs. Mattox*; 1 *J. J. Marshal* 202, 3, *Bain vs. Wilson*; 3 *J. J. Marshal* 7, *Dana vs. Barrett*; 6 *Com. Digest* 85; *Pleader* 670; 1 *Bibb* 461, 2, *Clay vs. Houston*; also; *Griggs vs. Bondurant*, 3 *Monroe* 178; this case is decisive of the question, and is parallel and almost identical with the case before the court.

DICKINSON, *Judge*, delivered the opinion of the court:

The only question presented for the consideration of this court is as to the correctness of the decision of the court below in sustaining the demurrer.

The defendant in this instance has wholly disregarded the 60th

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section of the *Rev. Ark. Stat. p. 627*, under the head of Practice at Law, which requires that when any demurrer shall be filed in any action, and issue joined thereon, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear, without regarding any defect or other imperfection in the process or pleadings, so that sufficient appear in the pleadings to enable the court to give judgment according to the very right of the cause, unless such defect or imperfection be specially expressed in the demurrer; therefore, upon the principles decided at the present term of this court, in the case of *Davies vs. Gibson*, we must consider it as a general demurrer, and the only question presented for our decision is, whether the plaintiff has stated and set forth a sufficient cause of action to be legally entitled to a recovery. The declaration contains two counts, and each one is founded on a promissory note executed on the first day of February, 1839, to the plaintiff, by which the defendant acknowledges himself to owe said plaintiff the sum of three hundred and thirty dollars and eighty-four cents in good cash notes, and alleging that the same remain due and wholly unpaid by the defendant. These facts are sufficient in law to entitle the plaintiff to a recovery and are pleaded in the declaration with sufficient certainty; while the defendant has omitted to state in his demurrer in what respect the declaration is defective or imperfect, and unless such defect or imperfection is so stated and set forth, this court is not authorized to regard it.

Wherefore, the opinion of this court is, that the judgment of the court below in sustaining the demurrer to the plaintiff's declaration is erroneous, and that the same ought to be reversed with costs, and this case be remanded to the Hempstead Circuit Court for further proceedings to be had therein, not inconsistent with this opinion.

ISRAEL WOOLFORD *against* ANDREW G. DUGAN.

ERROR to the Pulaski Circuit Court.

Where the suit below was commenced by a writ of *capias*, to which no judicial seal was attached, the writ was illegal, and imposed no legal duty on the defendant to observe and obey its mandate, nor could it be the foundation of a judgment by default.

This was an action of debt on a writing obligatory, commenced and prosecuted in the Circuit Court of Pulaski county, by *Dugan* against *Woolford*. The plaintiff below, upon his affidavit filed, sued out and caused to be issued by the Clerk of said court a writ of *capias ad respondendum* against the defendant, returnable to the March term of said court, A. D. 1839, without the seal of said court affixed thereto, which was executed on the defendant, who procured bail according to law, and was therefore discharged from the custody of the Sheriff. At the term to which said writ was returnable, final judgment was given for the plaintiff below without any appearance whatever having been previously entered by the defendant. The declaration is founded on a writing obligatory for the sum of \$300, due Dec. 25, 1838. The judgment, which purports to be by *nil dicit*, states that the action is founded on a writing obligatory for \$300, due Feb. 25, 1838. To reverse this judgment *Woolford* sued out his writ of error.

FOWLER, for plaintiff in error.

ASHLEY & WATKINS, *contra*.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The only question material to be decided, is whether the writ of *capias*, without the seal of the Circuit Court thereto, is sufficient in law to authorize a judgment by default, for the non-appearance of the defendant, to be given against him? The 14th section of the VI. article of the Constitution of this State, ordains that "all writs and other process shall run in the name of the State of Arkansas," and

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bear tests and be signed by the Clerks of the respective courts from which they issue, *Rev. Stat. Ark.* 36. And the 2d sec. of the 129th chap. of the *Rev. Stat. Ark.* 777, provides that "all such writs shall be sealed with the judicial seal of such court." These injunctions of law are positive and peremptory, and must be observed and obeyed; and, therefore, any process issued out of any court of record having a judicial seal, without such seal being affixed thereto is illegal, and cannot impose any legal duty on the person upon whom it is executed to observe and obey its mandate, or become the foundation of a judgment by default, for the non-appearance of the defendant, and upon this ground the Circuit Court erred in giving judgment against Woolford, he not having entered his appearance to the action, and therefore the judgment of the Circuit Court of Pulaski county must be, and the same is hereby, reversed, annulled, and set aside with costs; and the cause remanded to said Circuit Court for further proceedings thereon to be there had, according to law, and not inconsistent with this opinion. But according to the uniform practice in such cases, the defendant below, as he has voluntarily made himself a party to this suit, by prosecuting his writ of error in this court must, upon the return of this case to the Circuit Court as above directed, be regarded as though he had been duly served with a valid writ to appear there, and answer the action of the plaintiff, more than thirty days previous to such term of said court.

JOHN ROBINS *against* ABSALOM FOWLER.

ERROR to Pulaski Circuit Court.

A court is not bound to instruct the jury as to the law arising upon any abstract principle which may be presented.

To sustain a writ of error upon the ground that the court below neglected to charge the jury upon any question of law which arose out of the facts of the case, it must appear upon the record, not only that the facts upon which such question of law arose were in evidence in the cause, but also that the court was distinctly called on to instruct the jury on that point.

Where one motion for a new trial is overruled, the party making it, if he has other and better grounds, to which he was not before privy, may have the benefit thereof by a second motion for a new trial, if presented in proper time.

In order to the success of a motion for a new trial, on the ground of newly discovered evidence, the testimony must have been discovered since the trial: it must appear that it could not have been obtained with reasonable diligence on the former trial: it must be material to the issue: it must go to the merits of the case, and not to impeach a former witness; and, it must not be cumulative.

Where the evidence given on the trial is not before the Supreme Court, it is impossible to decide whether the newly discovered evidence goes to the merits, or merely to impeach a former witness.

And though the court below states in a bill of exceptions that the newly discovered evidence is material to the issue, still, unless the proof made before the jury is stated on the record, it is impossible for the Supreme Court to perceive whether the new evidence is, in fact, relevant and material. Where the court below, in the bill of exceptions, states the newly discovered evidence to be "material to the issue, because it conduces to prove certain facts," such evidence is shown thereby to be cumulative. Cumulative evidence is additional evidence to support the same point, and of the same character with evidence already produced.

And unless the exceptions taken show that the new testimony established facts which bear directly on the issue, and were not in proof before, and which are in themselves so material to the question that they might vary the result; even though the court below states them to be material to the issue, the Supreme Court will not presume that they are not cumulative.

Where the plaintiff in an action *ex contractu* entered a *nolle prosequi* as to two of three defendants, and then filed his amended declaration to which he made those two again defendants, and again subsequently entered a *nolle prosequi* as to them; *quare*, as to what would have been the result had objection to been taken to filing such amended declaration?

But at all events, the objection, if any, was waived when the other defendant appeared and made defence.

This was an action of assumpsit, brought against the plaintiff in error, and also James Tate and Jonathan Rogers, in the Circuit Court of Pulaski county, returnable to the March term thereof, 1839. Process not having been served on the two last named defendants, Robins alone appeared and pleaded his plea of non-assumpsit, to which issue was joined.

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The declaration contained three counts. The first charges that Robins, Tate, and Rogers, late partners in the brick-laying and plastering business, and in laying foundations of houses, and other buildings, in stone; and as such partners, doing business under the name, style, description, and firm of Robins, Tate, & Co., contracted to do certain work for said plaintiff. The second and third counts are for money paid, laid out, and expended, and for money had and received, &c., with breaches assigned.

At the return term, Fowler entered a *nolle prosequi*, as to Tate and Rogers, two of the defendants. A jury was then empannelled, but not being able to agree, they were discharged, a juror having been withdrawn.

After which, the record states, that "on motion of the plaintiff, leave was granted unto him to amend his declaration," and accordingly a new declaration was filed, in which Robins, Tate, and Rogers, are all again made defendants. The first three counts are similar to those contained in the first declaration, and the fourth is for work and labor done, which, on the motion of the plaintiff himself, was stricken out, to which the defendant Rogers, at the time objected, and filed his bill of exceptions thereto.

At the September term of the court Robins, by attorney, filed his plea of non-assumpsit; whereupon Fowler again entered a *nolle prosequi* as to Tate and Rogers, and took issue to the plea filed. A jury was then called, and judgment rendered in favor of Fowler for \$216, from which Robins sued out his writ of error. On the trial, and after the testimony was closed, Robins moved the court to instruct the jury, "that publication in a newspaper over the names of partners in any business is evidence of the business to be carried on by them, and that where a plaintiff sues such partners respecting business not included in such publication, and not connected with their partnership business, he must prove an express contract to do such work, and that otherwise he is not entitled to recover," which instruction the court refused to give, and the defendant excepted, and his bill of exceptions was made a part of the record in the cause. After the verdict and judgment, Robins moved for a new trial upon the ground that the verdict was contrary to law and evidence, and also

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contrary to the instructions of the court, which motion was overruled. Afterwards the defendant filed a second motion for a new trial, upon the ground of new testimony discovered, in support of which the defendant's affidavit was exhibited—"that Gilson Bass can give material testimony in the action, and that said testimony was not discovered until after the trial, and therefore the witness could not have been subpoenaed." Also, the affidavit of said Bass, "that some time in the fall of 1837, he received from Col. Fowler, some intimations that he would give him the mason work of a house that he was about to build, although they made no contract about it. And understanding subsequently, but previous to the commencement of the first foundation therefor, that he had let it out, he (Bass) went to see him on the subject, and in conversation he (Fowler) told him that he had let out or given the building of his house to Hollis and some other men whose names he did not recollect, and that they were to do the whole work in building the house, and that he could not therefore give him any portion of the work."

This latter motion was overruled, and in the bill of exceptions to the opinion of the court, it is admitted on the part of the court, that the testimony is material to the issue in the cause in this, that it conduces to prove that there was no such contract as the one mentioned in the declaration.

HEMPSTEAD & CLENDENIN, for plaintiff in error:

It is the right of either party, to call upon the judge, for such instructions as to the law, as are deemed necessary in enlightening the jury, in the matter of controversy, submitted to them by the issue.

Was the instruction asked for a legal one, or was it properly refused? If it was legal, it ought to have been given, and this court, sitting for the correction of error in inferior tribunals, will apply such a remedy as the nature of the case demands.

There is no branch of law better defined than the right, duties, and obligations of co-partners, in whatsoever species of business engaged.

A partnership is a consolidation of energy and capital for the

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attainment of pecuniary profit and advantage. Common sense itself suggests the necessity of announcing to the world the nature of the association, its limits, its purposes, to protect themselves as a body from obligations and liabilities which they never meant to incur.

Third persons then have a full knowledge of the extent of the liability, by which their interest too may be protected, and if in defiance of this a third person will make a contract with one partner, without the privity of the others, respecting a thing unconnected with the association, he acts at his peril, and could not in law or justice, hold the other partners responsible. It has grown into a custom as authoritative as municipal law, and is sanctioned by commercial convenience and usage.

How the annunciation is made, is a matter of indifference, perhaps but ordinarily a newspaper is resorted to as the best and speediest mode of giving notice to the greatest number of persons.

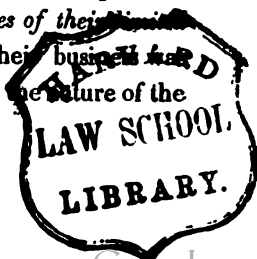
A publication in the newspapers of the nature of a co-partnership, is constructive notice to all those who may afterwards take the partnership security. 4 *John. Rep.* 251. Otherwise innumerable frauds might be committed upon a partnership by a dishonest partner, without end and without limit, and liabilities imposed as *joint* which were merely *individual*. The objects of such an association, so far from being promoted, would be constantly sacrificed, without any surety, that those who were acting in good faith would not become bankrupt under the consciousness that their affairs were in a flourishing condition—a bankruptcy more lamentable because unexpected.

The publication of a dissolution, and formation of partnership, stand upon the same footing, without a shade of difference between them. Both are necessary—both aim at the same thing—that is, to give notice to the world of an event which has happened. The one promulgates the fact of associated existence—of its nature—limits—and business to be pursued: the other the dissolution of the connection—the one is a notification of the extent of liability—the other that such liability has ceased. Publication in a newspaper, in both cases, is the only way by which the fact can be extensively communicated to the world. “All partnerships are more or less limited. There is none that embraces at the same time every branch of business, and

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where a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be some circumstances in the case to destroy that presumption. "If," says Lord Eldon (8 *Vesey* 544), "under the circumstances, the person taking the paper can be considered as being advertised, that it was not intended to be a partnership proceeding, the partnership is not bound." "Public notice of the object of a partnership, the declared and habitual business carried on, the store and counting-house, the sign, &c., are the usual and regular *indicia* by which the nature and extent of a partnership is to be ascertained. When the business of a partnership is thus defined, and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement, on any other than a partnership account. There must be some authority beyond the mere circumstance of partnership to make such a contract binding. Were it otherwise, it would be idle, and worse than idle, to talk of limited partnerships in any matter or concern whatever, and the law would be recognizing an association only to render it a most dangerous illusion to those whom it embraced." These are the observations of Chancellor Kent in the case of *Livingston vs. Roosevelt*, 4 *Johns. Rep.* 278. Public notice, in the newspapers is, in so many words, declared to be evidence of the objects of the partnership, and of the limitation of its responsibility. It may be rebutted, it is true, by showing that the partners have jointly departed from the particular business specified in the notice, by engaging in another, or with a knowledge of the fact, have permitted, or by their silence sanctioned a co-partner to do it for them, by which responsibility is fixed upon the firm.

In the same case Chancellor Kent said, "The partnership between the defendants was confined to the sugar refining business. It had nothing to do with the purchase or sale of brandies. The partners had given timely and due notice in the public gazettes of their partnership engagement, and had designated the place where their business was to be carried on. Every precaution was taken which the nature of the



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case admitted, to guard the public against misapprehension. The understanding of particular merchants, that the defendants were general partners was of no avail, without showing that the house had done some act to mislead or give some reasonable cause for that impression." 4 *Johns. Rep.* 276. In the same case *Van Ness J.* said, "*It would always be prudent and proper (though I will not say that it is indispensably necessary,) to give public notice to the community that the partnership is special, and of the particular species of traffic or business to which it is confined.*" *Ibid* 266. The doctrine, in this case, undoubtedly establishes the principle that publication in a newspaper at the commencement of a partnership of its object, and the business to which it is confined, will make it limited, or in other words special, and that third persons who have transactions with the firm are properly advertised of the fact.

Notices are to be found in almost every newspaper of the formation and dissolution of partnerships, which points out that as the mode generally adopted for notifications of this sort, and every prudent man in business ought to consult them. *Collyer on Partnership*, 311; 3 *Day*, 353; *Gow on Partnership*, 272. Notice in a newspaper is notice to all the world of the dissolution of a partnership. 2 *Chitt. Rep.* 121; 6 *Cow. Rep.* 701; 2 *Johns. Rep.* 300

Notice of a dissolution of a partnership, published in a gazette, which was taken by a bank, was held to be a sufficient notice to the bank though it had had previous dealings with the partnership. 1 *McCord*, 338; 6 *Cowen*, 101; 8 *Wendell* 423; 6 *Johns. Rep.* 147; 2 *McCord*, 379. The authorities are numerous upon this point, and without conflict; and by a parity of reasoning, fully establish the principle that publication of the commencement and nature of a limited partnership is legal and proper notice to all mankind, and that third persons must observe the terms, limits, objects, and business, in which the association is embarked, in all dealings and transactions, or otherwise suffer the consequences.

From these premises it incontestibly follows, as an inevitable consequence, that such a publication in either contingency, is competent evidence of the fact. It is consonant to one of the first rules of evidence that the best the nature of the case will admit of must be ad-

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duced, or its absence explained, before that of a secondary character can be admitted. It is the very best evidence of the nature and extent of the business in which co-partners may be engaged, and nothing short of a violent stretch of imagination could fancy any of a superior character, by which that fact could be proved. If a third person, with this knowledge derived from a publication, should make a contract with one co-partner respecting business not embraced in the association, nor connected with it, it will scarcely be contended, that it is a joint transaction, and therefore binding and obligatory upon the firm. Yet this would be the inevitable result, if a notice in the public press is not to be esteemed evidence of the business in which the co-partners are engaged. Of what possible utility can it be unless it can be used as evidence, if circumstances require its use? If it is not evidence at all, it is an idle piece of information, which may be read, it is true, but with no possibility of advantage.

One partner has an implied authority to bind the firm by contracts, *relating to the partnership*, whether such contracts be evidenced by bare agreements, oral or written, or by negotiable securities, as bills of exchange and promissory notes. Yet what contracts relate to the partnership, could scarcely be ascertained and defined, unless a publication in the press as to the nature and limits of the partnership, could be consulted as evidence of the fact? If the traffic or business to which the association is confined, is to be resorted to exclusively for proof of the fact, it is obvious that it is not only secondary evidence, precarious and uncertain in the highest degree, but that it would enable partners to shield themselves from obligations which had really been incurred.

It will perhaps be said that if publication in a newspaper is evidence of the limited nature of a partnership, and of the particular species of traffic or business to which it is confined, a door would be opened for fraud and deception, besides that the partners would be making evidence for themselves. To the first it may be answered that fraud may be practised in all the various relations of life, and that mankind are not so much protected from its baleful effect, by positive enactment, as dread in the perpetrator of incurring public resentment. To the latter it is answered that it is no more making evidence for a party, than

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is the production of the written articles of co-partnership, by which the nature of the partnership is shown, the conditions and stipulations which are to regulate the particular branch of business or trade to be carried on. As well might it be said that the plaintiff in ejectment who relies upon an indenture of himself and another, has made his own evidence by becoming a party to the contract, and hence ought to abandon the tribunal of justice, robbed of his rights, under the pretext of law. Nonsense like this, will scarcely be countenanced by the bench in an enlightened age.

Will it be argued for a moment, that an action against a firm, on a contract made by one partner without the knowledge of the others, and after a dissolution published in a newspaper, could not be successfully defended on the ground of misjoinder? Would not the notice, or advertisement, be evidence of the fact of misjoinder, and competent proof in every particular? Would it not be the best evidence that could be adduced? The nature of the case could admit of no other.

Yet it would be just as reasonable to say that the defendants made their own evidence, and that it is not therefore entitled to consideration, and that the firm must be responsible in despite of all efforts to dissolve the connection.

How could the fact of dissolution be otherwise proved? The oral declarations of the partners would be just as much evidence for themselves as a publication in a newspaper; besides of an inferior character in the scale of evidence, easily misunderstood, soon forgotten, misrepresented with facility, and conveyed to but few persons. If an advertisement in a public press is evidence of the dissolution, so is a like advertisement evidence of the commencement of a partnership; since human ingenuity cannot torture out a difference. It is a notice in either case, and like every other notice, is evidence of the facts contained in it.

The statute law of New-York, which can be considered in no other light than a declaratory act, regulates limited partnerships, and requires a publication of the terms of the partnership in two papers, and *ex vi termini*, imparts to such publication the character of evidence.

The Revised Statutes of our own State, prescribe the mode in which limited partnerships may be formed and also require the terms

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to be published in some newspaper, which publication is *expressly* made evidence of the facts therein contained.

This statute is also declaratory of a custom grown into law, and approved by judicial decisions. It creates no new rule, but affirms an old one, rendered necessary and adopted by commercial policy and usage. *Rev. Stat.* 601.

That a co-partner cannot bind the firm, out of their usual course of business, is beyond all kind of doubt, and is settled by a series of judicial decisions which cannot be shaken.

Generally the signature of one partner, in matters of simple contract relating to the partnership, binds the firm, for every partner may be considered as an agent for the rest of the partnership. *Doug.* 653, *Collyer on Part.* 239; 4 *Johns. Rep.* 265; *Collyer on Part.* 103; 6 *Bing.* 792. And this doctrine is founded upon good reason, and susceptible of complete demonstration.

Every partnership is limited to certain objects, and certainly a thing not embraced, can by no implication be construed to appertain to the association. The rule *expressio unius est exclusio alterius*, applies to the formation of partnerships as well as to the construction of instruments.

The nature of the partnership is *expressed*—the objects are *expressed*—and a liability cannot be fixed upon the firm, by the contract of one, when that contract does not relate to the business of the partnership. 4 *Johns. Rep.*, *Livingston vs. Roosevelt*.

If this is true doctrine, it is a corollary, that if the partnership is liable for the transaction of an individual partner, unconnected with the business of the firm, that liability must arise from the consent or privity of the other partners, or from an express contract. 4 *Johns. Rep.* 264; 2 *Caines* 246; 2 *Johns. Rep.* 300. The proof must be express and positive, for no presumption can be drawn from the fact of partnership.

The instruction asked for was a legal instruction, and the court erred in refusing to give it. The verdict could not have been the same, if it had been granted; but this is not the test of its correctness.

It is sufficient for this court to know that it was legal, and one which could be rightfully asked. If it was not given, our remedy is in

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this court, and we ask that the remedy be applied, by reversing the judgment of the court below.

The third error assigned is that the court erred in refusing a new trial on the ground of newly discovered evidence.

It is readily admitted that in ordinary cases the inferior judge is invested with considerable discretion in granting or refusing new trials. He sits, perhaps, more as a chancellor than as a common law judge; because upon a dispassionate and comprehensive view of the whole case, he determines whether justice requires that there should be a re-hearing.

The discretion however to be exercised in granting a new trial for newly discovered evidence is not an arbitrary but a legal discretion, and, therefore, subject to review. 10 *Wendell*, 285; 14 *Johns. Rep. Brill vs. Lord*.

Certain principles are settled with respect to new trials for newly discovered evidence, which must be considered as conditions precedent to obtaining it, or, in other words there must be certain pre-requisites. 1st. The testimony must have been discovered since the former trial. This fact must be contained in the affidavit of the applicant; and exists in this case, as the record will show. 2nd. It must appear that the testimony could not have been obtained with reasonable diligence on the former trial. The affidavit of the plaintiff in error shows that it was not discovered until after the trial, and therefore no diligence could have been used to obtain it. 3rd. It must be material to the issue. Its materiality is sworn to, and not contradicted by counter affidavits; besides, being declared material in the bill of exceptions. The declaration in the action shows its materiality, for if the contract for building the whole house was made with Hollis and some one else, the stone foundation must have been included; hence the action was improperly brought and the fact, if it could have been introduced, would constitute a complete bar to the action in its present form. 4th. It must not impeach the character of former witnesses. The record does not exhibit what evidence was given, and in fact, the verdict of the jury was founded upon mere inference. 5th. It must not be cumulative. It is not so in fact, nor does the record show it to be, either expressly or by implication. As

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to new trials for newly discovered evidence. *Vide*, 7 *Mass. Rep.* 207; 9 *Johns. Rep.* 264; 4 *Wendall* 579; 1 *Cowen Rep.* 359.

The record shows that there was a previous motion for a new trial on general grounds, but the second motion was made within the time prescribed by the statute, and on matter newly discovered, hence the first cannot prejudice the latter motion, since this new matter could not have been embraced in the first, because it was not known.

TRAPNALL & COCKE, *Contra*:

What are the facts of the case, or the evidence upon which the verdict was rendered, does not appear in the record. The pertinency of the instructions is not shown, and in the absence of all showing to the contrary, the judgment of the court below will always be presumed to be correct.

Not knowing the facts of the case, the bearing and weight of the evidence incorporated into the motion for a new trial cannot be estimated by the court, and therefore the invariable presumption in favor of the court below must operate with conclusive force in this case.

DICKINSON, *Judge*, delivered the opinion of the court:

It is assigned for error that the court below erred in refusing to charge the jury as required by counsel, and in refusing to grant a new trial upon the newly discovered testimony. We will consider these objections in the order in which they are presented. We understand it to be a rule well settled, and supported by all the authorities, that a court is not bound to instruct the jury as to the law arising upon the abstract principle which may be presented. How far the instructions might have been applicable to the case before the jury, it is impossible for this court to determine; for to enable us to form a conclusion whether such instructions were proper or not, and calculated to have an influence upon the finding of the jury, it was unquestionably necessary that the whole or a sufficient portion of the evidence should have been included in the bill of exceptions to have shown their applicability. It is a principle that cannot be controverted, that to sustain a writ of error on the ground that the court neglected to charge the jury upon any question of law which arose out of the facts

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of the case, it must appear upon the record, not only that the facts upon which such question of law arose were in evidence in the cause, but also that the court was distinctly called upon to instruct the jury as to the law on that point. As then we have nothing in the record before us to the contrary, we must presume that the court below considered the instructions asked for as improper, or inapplicable to the state of the case before them, and rightfully overruled the party's motion. The application for a new trial is deserving of more consideration. Although it is usual for a party to combine all his reasons in a motion for a new trial, yet when as in this instance, after the rejection of the first application, the plaintiff in error believed he could rest his case upon other and better grounds, of which he was not before privy, we can discover no good reason why he should not be permitted to avail himself of any advantage he possessed, when he presents in proper time. The Circuit Court having on the first motion already solemnly determined that the evidence was sufficiently clear and explicit to justify the verdict, and that it conformed to the law, we will consider the reason, to wit; newly discovered testimony, upon which the plaintiff in error evidently relies in his second application. There are certain principles upon this subject which must be considered settled. 1st. The testimony must have been discovered since the trial. 2nd. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3d. It must be material to the issue. 4th. It must go to the merits of the case, and not impeach the character of a former witness. 5th. It must not be cumulative. *People vs. Sup. Ct. of N. York.* 10 *Wend.* 292; 4 *Johns. Rep.* 425.

It cannot be denied but that the evidence was discovered since the former trial, and its materiality is proved by the record. Whether it goes to the merits of the case, or impeaches the character of a former witness, is impracticable for this court to determine, as the evidence given upon the trial is not before us. It is not clearly perceived in what manner the evidence of Bass was expected to be material to the defendant. That it might however have been material, and its bearing perceived by the court before whom the cause was tried, is by no means improbable; and while we are willing that every reasonable

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and probable inference favorable to the opinion of the court below should be indulged, it must be conceded that unless the proof made before the jury is stated on the record it will be impossible for us to perceive whether the testimony which the applicant expects to prove is relevant and will furnish proper matter for the consideration of a jury. The party does not show that he made any effort to discover testimony of a character similar to that which he expects to prove, nor that he could not have substantiated the same fact by some other witness. It only remains for us to consider whether the new testimony is cumulative. And that it is so is clearly shown in the bill of exceptions, in which the court below say that it *conduces* to prove, thereby indicating, as we understand, contributing or tending to prove certain facts in relation to which some testimony had already been produced on the trial. Cumulative means additional evidence to support the same point, and which is of the same character with evidence already produced. See *Price vs. Brown*, 1st *Sirange*, 691. We are strengthened in this view of the subject, because the exceptions do not state whether this new testimony establishes facts which bear directly upon the issue, and were not in proof before, and which are in themselves so material to the question that they might vary the result, or whether this further evidence merely tends to confirm the former testimony, or goes to discredit the plaintiff's witness without disclosing any new fact materially tending of itself to vary the defence. The court below, it is true, say that the testimony is material to the issue, but do not say that it related to any new fact. The whole of the evidence adduced before the jury, with that proposed to be produced, has been also before the court below; that court has thought proper, in the exercise of that legal discretion with which it is vested, to refuse the application. No doctrine is better settled than that which regulates applications of this sort, addressed as they are to sound discretion of the court. That discretion is to be exercised, it is true, not arbitrarily, but in consonance with the rules and usages of law, in furtherance of the justice of the cause. From any thing apparent on the record, we are totally at a loss to perceive upon what fact it was expected this court could predicate an opinion. The bills of exception contains no statement of the evidence given on the trial,

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and the record furnishes nothing from which we can infer either the nature or weight of evidence upon which the parties thought proper to rest the decision of their cause. As the party excepting to the decision of the court has not thought proper to make the evidence produced on the trial part of the record, every intendment should be indulged against him, and in revising that decision the court is bound to presume every fact, susceptible of proof and not repugnant to the statements contained in the bill of exceptions, to have been fully established; and these views are fully sustained in the case of *Wise vs. Heurd*, decided at the last term of this court. Thus proceeding, the principle is not perceived upon which the decision of the Circuit Court ought to be disturbed upon the errors assigned. This case, from its original commencement to its final termination in the Circuit Court, seems in its progress to have been conducted with an object in view and upon principles difficult for this court to perceive; and it has given us some labor to see distinctly into its merits, and to free it from the almost inexplicable confusion by which it is obscured. It will be recollected this is an action for breach of contract, and that there is a material distinction between actions *ex contractu* and *ex delicto*. In 1 *Chit. Plead.* p. 28, and in 1 *Saund.* 153 n., it is laid down, "that where there are several parties, if the contract is joint, they should all be made defendants, and that an omission of one can be taken advantage of by plea in abatement, unless it appears on the face of the declaration, or some other pleading of the plaintiff, that the party omitted is still living as well as that he jointly contracted, in which case the defendant may demur or move in arrest of judgment or support a writ of error; or it will be good ground of non-suit if, upon the trial, the plaintiff fails to prove a joint contract; for although in actions of tort one defendant may be found guilty and the other acquitted, yet in action for the breach of contract, whether it be framed in assumpsit, covenant, debt or case, a verdict could not in general be given against one defendant in a joint action without the other, unless there was some personal inability in point of law which would not render the contract obligatory, as infancy or coverture or the like." We are led to these remarks from the fact that previous to the first trial and issue joined, the plaintiff in the court below entered a *nolle*

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prosequi as to two of the defendants Tate and Rogers. At common law, where there are several defendants, a plaintiff may in tort enter a *nolle prosequi* as to a part of the defendants and proceed against the others; but the rule is different in actions upon joint contract; for a discontinuance as to one operates as a discontinuance as to all, unless in cases where, as previously remarked, one of the defendants pleads matter which goes to his present discharge. Such as bankruptcy, infancy, and such other pleas as go to the action of the writ; and this doctrine is fully sustained in the case of *Noke and Chiswell vs. Ingham*, 1 *Wilson*, 89; *Gibb vs. Morrill*, 3 *Taun.* 307; *Chandler vs. Parker*, 3 *Esp. Rep.* 77; *Tidds Prac.* 632; also in *Hartness vs. Thompson*, 5 *Johns. Rep.*, 160; and *Hale vs. Rochester*, 3 *Cow.* 374. The rule of the common law, however, upon this subject was changed and modified by the act of the General Assembly, passed 10th January, 1816. See *Steele and McCamp. Dig.*, 312 and 313, in which it was provided that "in all cases where there shall be several defendants to any suit or action, some of whom are summoned or taken, and others not taken, the plaintiff shall be at liberty to proceed against those summoned or taken, or may continue his cause and award alias writs till another term, at which time he shall proceed against those appearing." It is upon this statute, we presume, the plaintiff below proceeded when he entered a *nolle prosequi* against such of the defendants as were not summoned or taken and elected, to proceed against Robins alone.

We are not prepared to say, nor do we deem it necessary to express any opinion, as to what might have been the result if there had been any objections made to the filing of the second, or, as it is termed, amended declaration, in which Tate and Rogers are again introduced as defendants, as to whom, after the filing of a plea to the merits by Rogers, the plaintiff below again entered a *nolle prosequi*. The plaintiff in error, by his appearance, clearly waived any advantage which he might have possessed, and precluded himself from making any objection to the further proceeding on the part of the defendant in error. We deem it however proper here to remark that though in modern times great latitude has been allowed as regards amendments, yet they are always limited by due consideration for the rights of the other party. The discretion which is allowed to the courts in grant-

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ing amendments has certainly in this instance been liberally exercised; for if a plaintiff can be permitted to introduce new parties (as Tate and Rogers must, in this case), be considered, he can upon the same principle introduce a new and distinct cause of action, wholly changing the defendant's liability as well as the nature of his defence. It is unnecessary to comment further upon the proceedings in this case for the errors, if there are any, are waived by the act of the plaintiff in error, or cured by the 118th and 119th sections of the *Rev. Ark. Code*, 635, 636; which provide "that when a verdict shall have been rendered in any cause not the judgment thereon shall, be arrested or stayed for any misleading, discontinuance, insufficient pleading, or misjoinder," but "that such omissions, imperfections, defects and variances, and all others of a like nature not being against the right and justice of the matter of the suit, and not altering the issue between the parties on the trial, shall be supplied and amended by the court when the judgment shall be given, or by the court into which such judgment may be removed by writ of error."

We are therefore of opinion that the judgment of the Circuit Court ought to be affirmed with costs.

CLARK against GRAYSON.**ERROR to Hempstead Circuit Court.**

No valid judgment can be pronounced against any party, unless he first have notice, either actual or constructive, of the proceeding against him.

The record in this case states that at the October Term of the Circuit Court, 1837, *Grayson* moved the court for a judgment against *Clark* for the sum of \$125 14½ cts., paid by him as his security, to one Abraham Block, in recognizance of appeal from a judgment of Justice of the Peace to the Circuit Court, and judgment was accordingly entered against him for the above amount, with interest thereon at the rate of ten per cent. per annum from the 24th day of May, 1835, until paid, and also the costs of the motion.

TRIMBLE, for plaintiff in error:

There is no law authorizing the proceedings as they are exhibited by the record in this case. By the 34th section of the law, title Justices of the Peace, *Steele and McCamp. Digest*, p. 362, where the security in a recognizance of appeal pays the money, it shall be so returned on the execution, and that shall be a judgment of record on which an execution may issue; but the plaintiff in the court below had no right to tax the defendant in this case with the cost of the motion and judgment.

If the plaintiff in the court below had a right to proceed by motion, the defendant had a right to notice of the time and place of making said motion. *Hardin* 181; 1 *J. J. Marshall*, 12, 13; *Hardin*, 564, 565, 566.

PIKE, Contra:

The plaintiff in error contends, first, that there was no law in force when this proceeding was had, which authorized it, and therefore the Circuit Court had no jurisdiction, and the proceedings were *coram*

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non judice; and second, that in any event, the Circuit Court could enter no judgment on motion, where notice had not been given to the opposite party.

By section 34 of the law concerning Justices of the Peace, as arranged in the Territorial Digest, p. 352, and which is part of the act of Missouri Territory, approved Dec. 20, 1818, where judgment is given, and execution issues, from the Circuit Court, upon an appeal thereto from a Justice of the Peace, against the appellant and his security in appeal, the officer levying the execution is to specify in his return on the writ, by whom and how the execution is satisfied; and it was provided that the amount so paid by the security *should* be taken and considered a debt of record in his favor against the principal, and that the security might therein, as in other cases of debts of record thereupon sue out his execution, &c.

In what way could this execution be obtained? How could the debt be placed in the attitude of a debt of record? Could the execution issue, merely upon the return of the Sheriff on the original execution; and was the Clerk authorized, upon the Sheriff's return that the debt was paid by the security, to issue execution in favor of the security against the principal?

On the other hand, was it not necessary, that after the security had paid the debt, he should make it appear upon the record of the court that he had done so, and upon that being shown and made of record, issue his execution? The return of the Sheriff is made by the law conclusive. No evidence could be admitted to impeach it; and when he had returned that the security had paid the debt, the amount so paid was to be held a debt of record. Is there any thing in the law which prevented the security from asking of the court, at the same time producing to them the Sheriff's return, and showing that he had paid the debt, that the fact of payment, and the legal consequences therefrom arising, should be made of record? It was clearly unnecessary for the Circuit Court to have formally rendered a judgment against the principal in favor of the security; because the matter then transacting could not legitimately be considered as a proceeding against the principal; but merely an *exparte* entry upon the record, by the security, of a fact which he had the

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right by law to place upon the record, without giving the principal any notice thereof whatever. And if the court, after placing upon its record the fact, which upon the Sheriff's return they were bound on application of the security to do, that the security had paid the debt, saw fit also to declare upon the record that the amount so paid should be taken as a debt of record, or in other words, give judgment for the amount, the court merely did an unnecessary act, by determining what the law had already determined. The judgment was merely surplusage, because upon its being made of record that the security had paid the debt, he was entitled, without a judgment, to his execution. And we do not see upon what ground it can be contended that the court could not declare the legal consequence of facts apparent on the record; or render a judgment where the law had declared that there should be one. In declaring that the amount paid by the security should be taken and considered as a debt of record, no provision is made for notice to be given to the principal. If execution was to issue by the action of the Clerk, upon the Sheriff's return merely, certainly no notice was to be given to the principal.

That the security here had paid the debt, appears on the record. As a matter of course, such being the fact, he was entitled, either with or without the action of the court, to his execution. That is all which he can obtain by his judgment. By it he receives no more than the law entitles him to—the court has done no more than to enforce a right which the law gave him. He was entitled to his execution, without giving any notice to the principal, and we cannot conceive how it can be error for a court to have ordered, or given authority to, its Clerk, to do that which he was in any event bound by law to do.

DICKINSON, *Judge*, delivered the opinion of the court:

The only question is as to the legality of the judgment. The record simply shows the motion, and that the judgment was entered in conformity to the application of the party, and appears to be predicated on the 34th section of the act regulating the proceedings before Justices of the Peace, as contained in *McCampbell's and Steele's Dig.*, p. 362, which provides that "in all cases of appeal or certio-

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rari from Justices of the Peace, by existing laws on those subjects, if the judgment of the Justice be affirmed, or judgment given on a trial upon the merits *de novo*, in the Circuit Court, judgment shall be given, and execution issue not only against the original defendant or defendants in the suit before such Justice, but also against his or their security or securities in the appeal bond, or bonds, to prosecute such certiorari; and the amount of such judgment with costs, shall be levied by the Sheriff or proper officer on the estate, real or personal, of such security or securities in case the original party does not, or cannot, satisfy the said judgment. And the Sheriff, or proper officer, shall specify, in his return of the writ, how and by whom such execution shall have been satisfied; provided that the amount satisfied and paid by such security or securities shall be taken and considered a debt of record in his or their favor against any such principal debtor or debtors. And such security or securities may, as in other cases of debt of record, thereupon sue out execution against the property, real or personal, of such principal debtor or debtors." There is no evidence that any notice, either actual or constructive, was given to Clark, or that he waived it by personal appearance. The filing of the motion was the first and only step taken previous to judgment. It was decided at last term of this court, in the case of *Webb vs. Estill*, that a party must have notice, either actual or constructive, before a judgment can be legally and rightfully entered against him. This doctrine we consider supported by every principle of justice, and too well established to admit of a doubt of its correctness. From the state of the case as presented to us on the record, we are of opinion that the court below erred in permitting judgment to be entered against Clark, and therefore ought to be reversed with costs.

POGUE against RICHARDS.***ERROR to the Washington Circuit Court.***

At the last term of this court, the appellee produced in court, and filed the certificate of the Clerk of the Circuit Court of Washington county, that an appeal had been entered, and a recognizance given in this case according to law, at the May term of said Circuit Court, in the year 1839; whereupon this court entered a rule against the appellant to appear on the first day of the present term and show cause why the judgment appealed from should not be affirmed, by reason of his failure to file in this court ten days before the last term thereof, a duly certified transcript of the record in this case, and also for his failure to file his assignment of errors therein, within the first four days of the last term of this court as required by law; but there being no legal service of said rule on the applicant, the same was renewed at the present term, and made returnable to the court on the thirty-first day of January, 1840, on which day, the same being returned executed according to law, and the appellee thereupon renewing his motion previously made to affirm the judgment; and the appellant not showing any cause for his failure to file in this court a duly certified transcript of the record in this case according to law, the rule against him was made absolute; and the judgment below agreeably to the requisitions of the 24th section of the 117th chapter of the Revised Statutes of Arkansas, p. 644, was affirmed with costs.

*COLE and SEVERS against WAGNON, Adm.**ERROR to Washington Circuit Court.*

Where the record states that the defendants severally filed special pleas of justification, besides jointly pleading the general issue; but no such pleas appear on the record; and further states, that the defendants, being served with a notice to produce the papers under which they severally so justified, failed and refused to produce them, but no such notice appears on the record; the record fails to show any requisition on them to produce the papers, and they do not appear to have been under any legal obligation to produce them.

In such case it was error to sustain a motion by the plaintiff to disregard such pleas, and give judgment by default.

But as no such special pleas appear in the record, they cannot be regarded as interposing any defence to the action: nor can the Supreme Court know what the facts so pleaded were, or whether they were so pleaded as to constitute a legal bar to the action.

And the judgment below, in such case, being against the party pleading, there being nothing in the record to prove the judgment wrong, or that such pleas were applicable to the case, or legally sufficient in bar, the judgment will not be set aside, although the reason assigned by the court for disregarding such pleas, is illegal or insufficient.

Where the plea of the general issue, purports to be the plea of one defendant only, if judgment by default, for the failure of the other defendant to plead is given against both, it is not good as to either.

It was error to disregard the plea of not guilty and render judgment by default, even if papers on which the defendants relied in their special pleas, were not produced after due notice. The defendants could only be defaulted as to that part of their defence to which the papers not produced applied.

This was an action of trespass instituted in the Circuit Court of Washington county, by *Thomas Wagon* against the plaintiffs in error. At the term to which the case was returnable, the defendants, upon affidavits filed, obtained a continuance of the cause generally without pleading and with leave to plead at the next term; when, as the record states, they pleaded the general issue jointly; and severally pleaded special pleas in justification; but no special pleas are contained in the transcript of the record. The record further states that the defendants being served with a notice to produce the papers under which they severally justified in their said special pleas mentioned, failed and refused to produce the same; but no such notice appears in the transcript of the record. The plaintiff then moved the court to disregard said pleas, and treat them as a nullity, and award him a judgment as by default because of the non-

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production of said papers by said defendants, which motion was sustained, and judgment in due form entered "that said several pleas of the said defendants, be disregarded and treated as a nullity, and that the said plaintiff have judgment against the said defendants, as by default;" and thereupon a writ of inquiry was awarded, returnable to the next term, to assess the damages sustained by the plaintiff, by reason of the trespass, mentioned in his declaration, and the case continued; after which, and before the damages were assessed, the plaintiff appears to have died, and the suit to have been revived in the name of the defendants in error, as his legal representatives, and the damages subsequently assessed by a jury not sworn to try the issue, but "well and truly to try and true damages assess according to evidence," at the sum of \$120, for which final judgment was rendered in favor of the plaintiffs.

WALKER, for plaintiff in error:

In order to force a party who is alleged to have charge of a paper, which the adverse party wishes to use, to produce it, the fact that such paper is in the party's possession must be verified upon motion and affidavit or other competent evidence, for such party is not bound to obey every capricious demand made of him. This appears not to have been done, nor does a notice in writing appear to have been filed. But conceding this to have been done, the subsequent motion to treat all the pleas as nullities should not have prevailed. The general issue was tendered, and although the special pleas might have been rejected, the defendants were not in default whilst that issue remained, as the statute only designed depriving the party of the benefit of his writing, or the pleadings based upon it, if he refused to produce it when regularly called on, not to deprive him of his whole defence.

Ringo, *Chief Justice*, delivered the opinion of the Court:

The plaintiffs in error allege that there is error in the judgment, sustaining the plaintiff's motion to disregard their pleas and treat them as a nullity, and also in giving judgment for the plaintiff by default after their plea of not guilty had been filed, and they had severally interposed a special plea in justification, as well as in swearing

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the jury to inquire of damages, when they should have been sworn to try the issue. These questions will be considered and disposed of in the order in which they are above stated. The motion to disregard the plea may have been and probably was based upon the 49th section of the Statute, passed 3d July, 1807, as contained in the Digest of Laws of Arkansas, by Steele and McCampbell, page 331, but if it was, the record fails to show any requisition upon the defendants to produce them, and the court erred in sustaining the motion of the plaintiff to disregard the pleas and give judgment as by default against the defendants; and we are not aware of the existence of any other law justifying such judgment for the non-production of books or writings, in the possession of the defendants, under any circumstances; but inasmuch as these special pleas do not appear in the record before us, we cannot, according to the principle stated in the case of *Davis vs. Gibson*, decided at the present term, regard them as interposing any defence to the action, because it is impossible for us to know, what the facts so pleaded were, or whether they were so pleaded as to constitute a legal bar to the action; besides the judgment of the Circuit Court is against the parties pleading, and there is nothing in the record which proves that judgment wrong. The special pleas, for aught that appears, may have been inapplicable to the case, or legally insufficient to bar the action, in which event, the judgment should not be set aside for the defendants below, because the record does not show that their rights have been prejudiced by it, notwithstanding the illegality or insufficiency of the reason assigned by the court for disregarding them.

Such, however, is not the case in regard to the general issue, which, as the record states, was pleaded jointly by the defendants previous to the giving judgment against them, as by default; and although the plea, as it appears on the record before us, purports on its face to be the plea of the defendant Cole only, this can make no difference as to the question now under consideration, for it must be admitted, that the failure of Severs to plead could not in any manner prejudice the defence made by his co-defendant; and, therefore, if the judgment, as given, is not warranted by the circumstances of the case, as to both, it cannot, upon legal principles, be supported as to

either; and as we have already decided that the defendants do not appear by the record, to have been required in the manner prescribed by the provisions of the statute above cited, to produce the papers mentioned in the special pleas, and that the court was not therefore warranted in giving judgment that the special pleas should be disregarded, upon the ground of the papers therein mentioned not being produced; it follows of course, if that decision be correct, that the court erred in disregarding the plea of not guilty, and treating it as a nullity, and proceeding to pronounce judgment against both defendants, as by default, which could not have been legally done, even if the defendants had been regularly and legally required to produce the papers or writings mentioned in their special pleas, in the manner prescribed by the statute; because, according to the very language of the statute, judgment by default could only be given as to that part of the defence, "to which the books or papers of the party are alleged to apply," and in the present case there is no allegation that the papers or writings in question apply to the defence, upon the general issue, nor is there any pretence, or reason to believe, that they could have been used as testimony for either party. On the trial of this issue, therefore, the court erred in giving judgment for the plaintiff as by default, and treating the pleas of not guilty interposed by the defendant Cole, as a nullity, and for this error, the final judgment of the Circuit Court, as well as the judgment by default, given in this case, are hereby reversed, annulled, and set aside, with costs, and this cause remanded to said Circuit Court for further proceedings therein to be there had, according to law, and not inconsistent with this opinion.

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61	508
9	158
166	204

HEILMAN against MARTIN.

ERROR to Pulaski Circuit Court.

All pleas to the jurisdiction of a Superior Court, must show, not only such facts as take the case out of the jurisdiction; but also that there is some other court in which effectual justice may be administered; for if there is no other place or mode of trial, that alone will give the Superior Court jurisdiction.

Where a defendant withdraws his general demurrer to the declaration, he must be considered as undertaking to plead issuably to the merits.

A general demurrer is regarded as a plea in bar, and a defendant, after interposing it, is precluded from pleading, either to the jurisdiction, to the disability of plaintiff or defendant, to the count or declaration, or to the writ, in abatement: and if he does so plead, the plaintiff may properly move to strike out his plea, or may disregard it altogether.

The Court of Probate, in each county of this State, under the Constitution, and the act of 1836, consists of a single judge, and has a general jurisdiction over the appointment of guardians, which is not by any law given concurrently to the County Court: and the latter court possesses no power to appoint a guardian.

Where the caption of the record of such an order of appointment shows that two Justices of the Peace sat as members of the court making the appointment, together with the Probate Judge, they must be considered as having participated in the appointment, although the record is signed by the presiding Judge alone; and such order will be taken to have been made, not by the Probate, but by the County Court.

The records of a court composed of several members, or having by law one presiding officer, are not usually signed by every member of the court: and when any member of a court is once shown by the record to have taken his place upon the judicial seat, upon any particular day of a term, his presence and participation in all the business transacted in court during that day, must be presumed until the contrary is proved.

Even where the relation of guardian and ward existed at common law, the ward might maintain an action of account against his guardian after he came of age; and might, while under age, call him to account by bill in chancery.

The personal disability of a ward to sue his guardian was matter in abatement only; and therefore, under the general issue, in an action of assumpsit for work and labor done, by ward against guardian, evidence proving the relation of guardian and ward to exist, is not admissible.

A bond given in his capacity of guardian, by a person appointed as such by a court having no power to make the appointment, is void.

Even if such a bond were valid, it is doubtful whether the ward could sustain an action upon it, to recover the value of work and labor by him done for the guardian. Such a bond imposes no obligation on the guardian to pay the ward for services and labor; which is a matter in no wise connected with his trust, or the due and proper performance of his duties as guardian.

And even if the ward would be compelled to resort to his action on such bond, yet, where the bond is merely transcribed by the Clerk, as a part of the record, without being legally made a part of the record, the existence of such a bond does not appear, so that it could bar an action of assumpsit.

The Constitution, giving to the Circuit Courts original jurisdiction in all matters of contract where the sum in controversy is over one hundred dollars; in an action of assumpsit, the *verdict* does not furnish the true rule by which the sum in controversy is to be ascertained.

It may determine the controversy, or ascertain the respective rights of the parties in the subject matter of the controversy; but cannot indicate or decide what was originally in controversy between them; unless that matter be directly put in issue by

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a plea to the jurisdiction, setting forth such facts as exclude the court from exercising jurisdiction.

This is only necessary in cases where the plaintiff sets forth such facts as present a case within the jurisdiction of the court, although the true and real matter of controversy is not within its jurisdiction.

And in such case, if no sufficient plea to the jurisdiction is interposed, the Circuit Court has a legal right to adjudicate the matter, and pronounce final judgment, although the verdict may be for a less sum than one hundred dollars, or in favor of the defendant.

The true rule on this subject is, that in all actions, except covenant, where the law limits and specially prescribes the precise sum which may be recovered, upon the cause of action, set out in the plaintiff's declaration; and such cause of action, as therein stated, presents a liability or demand exceeding one hundred dollars, exclusive of interest, which, if admitted or proven, the plaintiff is legally entitled to recover, the Circuit Court has jurisdiction, and may pronounce final judgment, if no sufficient plea to the jurisdiction be interposed.

But if such plea be put in, and it appears on the trial thereof, that so much of the plaintiff's demand, as reduces it to a sum not over one hundred dollars, is altogether unfounded or fictitious, or has been paid, or otherwise legally discharged or satisfied, so that the real sum in controversy does not exceed one hundred dollars, the suit must abate for want of jurisdiction.

This rule applies to all actions upon liquidated demands, actions of indebitatus assumpsit, and all other actions, where the law limits and specially prescribes the sum which may be legally claimed and recovered upon the contract as set out or presented by the plaintiff, and no discretion is left with the court or jury as to the amount to be recovered, if the contract be admitted or proved as stated.

But where the law does not limit and specially define what sum shall be recovered upon the contract as stated, but leaves it in the discretion of the court or jury to determine what amount the plaintiff ought to have for the non-performance of the contract as set out, or presented by the plaintiff, as in assumpsit for breach of contract to marry, and the like, in which the damages, or sum which may be recovered, are unliquidated and uncertain, the damages claimed in the declaration constitute the sum in controversy, and determine the jurisdiction.

This was a suit commenced by the defendant in error as a minor under twenty-one years of age, by William Ward, as his next friend and guardian, against the plaintiff in error, in the Circuit Court of Pulaski county, in assumpsit. The declaration contains but one count, which is in the usual form of the common count for work and labor done and performed, and money lent and advanced. The sum alleged to be due and owing for the former is \$150—that on account of the latter \$101—and damages are claimed to the amount of \$200. At the term to which the writ was returnable, Heilman filed a general demurrer, to the declaration but afterwards, before any further proceeding was had in the case, withdrew it, by leave of the court, and filed his plea of non-assumpsit, together with a plea to the jurisdiction of the court; the defendant in error joined issue to the former, and, on his motion, the court struck out the latter, whereupon the case was continued.

At a subsequent term the case was tried by a jury, and a verdict

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returned, and judgment thereupon pronounced in favor of the defendant in error for the sum of \$94 64 cts., his damages assessed by the jury, together with the costs of suit.

During the trial Heilman, to prove himself the guardian of said Martin, offered to read as evidence, an order from the record book of what purported to be the record of the County Court of the county of Pulaski, but signed by David Fulton, who at the time was Judge of the County and Probate Courts, as appears by reference to the record, the caption of which, as stated in the bill of exceptions taken on the trial, is as follows: "Friday morning, July 14, 1837. Court met pursuant to adjournment. Present the Hon. David Fulton, Judge, and Allen McLain and Richard C. Hawkins, Esqrs., Associate Justices." After which follows the order in question, which recites the appearance in court of Ambrose Hudgens, Sen., and John Martin, and Albert Martin, his indented apprentices, and states that they, the said John Martin and Albert Martin, had left the employment and guardianship of said Hudgens, without cause or his consent, and that said Martins respectively being present in court, requested the court to appoint Heilman their guardian, and that the court did, on consideration, vacate their indentures of apprenticeship to Hudgens, and appointed Heilman their guardian, on his entering into bond with sufficient security for the faithful performance of his duty, in the sum of four hundred dollars; but the defendant in error objected to his reading said order to the jury as evidence, and the court sustained his objection, and would not suffer it to be read to the jury as evidence, whereupon Heilman excepted, and in his bill of exceptions set forth all of the evidence adduced on the part of the defendant in error, and so much of said record as he offered to read as evidence, which was signed and sealed by the court, and made part of the record of this case. Whereupon he brought his case up by writ of error, and by his assignment of errors questioned the correctness of the decision and judgment of the Circuit Court. 1st. In striking out his plea to the jurisdiction of the Court. 2nd. In refusing to suffer him to read to the jury as evidence the record of his appointment as guardian of the defendant in error. 3d. In giving judgment for the defendant in error, because his action is misconceived, his remedy (if he has any

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remedy at law,) being by an action on the bond executed by the plaintiff as his guardian, and not by an action of assumpsit. 4th. The obligation of Heilman for the services and labor of his ward is equitable, not legal, and an action at law therefor is not the appropriate remedy. 5th. In giving judgment in favor of the defendant in error for his damages assessed by the jury, with costs of suit, notwithstanding the damages so assessed do not amount to one hundred dollars. 6th. That judgment was rendered for the defendant, whereas, by law, it should have been for the plaintiff in error.

TRAPNALL & COCKE, for plaintiff in error:

FOWLER, *Contra*:

The court did not err in striking out the attempted plea to the jurisdiction. Such plea could not be filed after a plea in bar to the merits, such as that of *non-assumpsit*, which was the *first* plea offered by Heilman. After filing the *general issue*, Heilman was barred from pleading in abatement or to the jurisdiction. Said plea to the jurisdiction was fatally defective, even had it been offered in time, *on its face*, or for the want of an affidavit averring its truth. It was therefore properly stricken out. *Pope, Steele, and McCampbell's Dig.*, 321; *Hard. Rep.*, 65, *Meggs vs. Shaffer*. The court properly refused to admit the record of the County Court, in evidence—the County Court having no power under the Constitution and laws of the State to appoint guardians. This power belongs exclusively to the Court of Probate, which is a separate and distinct tribunal from the County Court. See *Const. Art. 6, sec. 10*; *Act of Assembly of 1836, entitled "An Act to establish County Courts,"* 178, *et seq.* And the fact that such order was made by the County Court, is conclusive, not from the caption of the record, but from the body of it, showing that it was made by David Fulton, Judge, and Allen McLain and Richard C. Hawkins, Esqrs., Associate Justices of the County Court. These Justices could not sit in, or participate in the acts of, the Probate Court. If the Bond be taken as a part of the evidence excluded, and properly embodied in the transcript, the case is not bettered for Heilman. Upon its face it shows that it was executed by virtue of an order of the County Court, a tribunal which had no power to

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make such order; consequently no action could be sustained thereon by Martin, or any body else. It is void. A bond, required by statute, must be taken in strict pursuance of the statute, or no action can be sustained upon it. See *Ark. Rep.*, 144, *Ashley vs. Lindsay's, Ex'rs*. Recognizance and bond, under a statute, are construed alike in all their bearings, and must strictly follow the statute in substance. Assuming the foregoing positions to be correct, and that the appointment of Heilman, and his bond, are nullities, it follows, as a necessary result, that the position assumed by Heilman's attorney, in his fourth assignment of error, giving Martin relief in equity only, is both untenable and absurd.

The Circuit Court properly rendered judgment for the damages—seventy-five dollars—assessed by the jury. It was legally bound to do so. In actions sounding in damages, it is the amount claimed in the declaration and writ that gives jurisdiction to the court, and the finding of the jury for a less sum cannot take away the jurisdiction once acquired. See 1 *Bibb Rep.*, 342, *Singleton vs. Madison*; *ib.*, 402, *Hume vs. Ben*; 1 *Wils. Rep.*, 19, *Pitts vs. Carpenter*; 7 *Monroe Rep.*, 221, *Grant vs. Tams & Co.* The question as to the jurisdiction, in this case, does not come within the decision made in the case of *Berry and Linton*, at a former term of this court. That was an action of debt, on several notes, each of which, taken separately, was within the exclusive jurisdiction of a Justice of the Peace. This is an action *sounding in damages merely*, in which more than one hundred dollars is claimed both in the declaration and writ, and more than one hundred dollars is proved to be due, as shown by one of the defendants, (Heilman's), bills of exception, and a party's bill of exceptions must always be construed strictly against himself.

Ringo, *Chief Justice*, delivered the opinion of the Court:

The questions arising in this case may be disposed of in the order in which they are stated. The decision upon the plea to the jurisdiction of the court, although drawn in question by the assignment of errors, was not controverted in the argument, and although not formally withdrawn or abandoned, does not appear to be relied on by the plaintiff, and the principles upon which it should have been struck

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out, are so well established, and so obviously applicable to this case, that argument in support of the decision is deemed unnecessary, however, it may not be improper to state them briefly. The plea is in these words, "and for further plea in this behalf the defendant saith that the amount of money assumed by the *plaintiff* to be paid to the plaintiff is less than one hundred dollars, and this he is ready to verify, wherefore," &c. It appears to be well settled by the adjudication in all the courts of England, and most, if not all, of the courts in the several States of this Union, that all pleas to the jurisdiction of the Superior Courts must show, not only such facts as take the case out of the jurisdiction, but, also, that there is some other court in which effectual justice may be administered, for, if there is no other place or mode of trial, that alone will give the Superior Courts jurisdiction. 1 *Chit. Plead.* 479; *Lawrence vs. Smith and Russell*, 5 *Mass. Rep.*, 362; *Rea vs. Hayden*, 3 *Mass. Rep.*, 24; and the application of these principles to the present case is not opposed by any thing contained in the Constitution or laws of the State, because in the distribution of the judicial powers the Constitution confers on the Circuit Courts original jurisdiction of all civil cases which shall not be cognizable before Justices of the Peace, until otherwise directed by the General Assembly; and the facts of this case, as disclosed by the declaration, not only show a case within the jurisdiction of the Circuit Court, but if true, disclose a case over which no other legal tribunal in the State can exercise jurisdiction. It, therefore, devolved upon the party controverting the jurisdiction by plea, to set forth in his plea, in addition to such facts as would divest the court of its apparent right of jurisdiction, such other facts as should clearly indicate what tribunal in particular had the rightful cognizance of the case. These essential allegations are entirely omitted in the plea under consideration, and Heilman having first interposed his general demurrer to the declaration must, upon the withdrawal of his demurrer by leave of the court, be considered as undertaking to plead issuably to the merits; beside which, there is no proposition better settled by adjudication, and supported by reason and justice, than that a party by inverting the established order of pleading is "precluded from pleading any matter prior in point of order." 1 *Chit. Plead.*, 426; *Co.*

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Lit. 303; Com. Dig. Abatement, C.; and a general demurrer being regarded by the law, as a plea in bar to the action itself, Heilman, after he had interposed his demurrer, was precluded from pleading either to the jurisdiction of the court, to the disability of the plaintiff or defendant, to the count or declaration, or to the writ; because, by pleading to the action itself in bar thereof, (which, in this cause, he had twice done when the plea under review was filed,) the law regards him as having admitted on the record, that there was no foundation for either of the defences before mentioned, and, therefore, as well as for the defect apparant on the face of the plea, Martin would have been justified in disregarding it altogether, but the course pursued by him was more appropriate, and is fully authorized by the practice in England and in this country; and whatever may be the legitimate and authorized construction of our statute which provides that the plaintiff in replevin, and the defendant in all other actions may plead as many several matters, whether of law or of fact as he may think necessary for his defence; we do not, under the circumstances, consider it as having any application to the present case.

The second question presented by the record and assignment of errors, whether viewed simply as a question of jurisdiction between the County and Probate Courts, or, as one depending upon the relative rights of the parties, if they are to be regarded as legally standing in the relation of guardian and ward, is more interesting and important in its consequences to the community generally. Heilman, on the one hand, insists that he was the guardian of Martin, appointed and qualified according to law, when the services and labor for which he is sued in this action, were done and performed: and that an action of *assumpsit* cannot, if indeed any action at law therefor can, be maintained against him, which he controverts and denies, while on the contrary the defendant in error contends that the appointment of Heilman, as his guardian, was made by the County Court, instead of the Probate Court, which had the legal authority to make it, and that the County Court had no jurisdiction or power whatever over the subject, and therefore the appointment in question being *coram non jndice*, is void, and the record thereof was properly excluded from the jury.

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In the investigation of this question we have considered. 1st. Upon what court the general jurisdiction to appoint guardians for minor orphans is conferred. 2nd. By what court the appointment or order in question was made. 3rd. Is it competent legal evidence for Heilman in the present controversy. The Constitution of this State, art. VI. sec. 9., ordains that "there shall be established in each county in this State, a court to be holden by the Justices of the Peace, and called the County Court, which shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties."

Sec. 10. There shall be elected by the Justices of the Peace of the respective counties, a presiding Judge of the County Court, to be commissioned by the Governor, and hold his office for the term of two years, and until his successor is elected and qualified. He shall, in addition to the duties that may be required of him by law as a presiding Judge of the County Court, be a Judge of the Probate Court, and have such jurisdiction in matters relative to the estate of deceased persons, executors, administrators, and guardians, as may be prescribed by law, until otherwise directed by the General Assembly."

The General Assembly, by a Statute approved, Nov. 7, 1836, declare that the presiding Judge of the County Court, "in addition to the duties required of him, as presiding Judge of the County Court shall be Judge of the Court of Probate, and the said Court of Probate, so constituted, shall have the following jurisdiction, to wit: the taking probate of wills, the granting letters testamentary, and administration, the appointment of guardians, and the settlement of executors', administrators', and guardians', accounts; and have the right of adjudicating all claims presented for allowance against executors, administrators and guardians." *Acts 1836, p. 179.*

The above quotations shew conclusively that the Court of Probate, organized under the Constitution, in conformity with the provisions of the Act of 1836, in force at the date of the order in question, consisted of a single Judge, and had a general jurisdiction over the appointment of guardians, which was not by any law concurrently given to the County Court, and it did not therefore possess any jurisdiction over

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the subject, or power to make the appointment under consideration. The caption of the record of said order, as set forth in the bill of exceptions, proves that two Justices of the Peace sat as members of the court, with the presiding Judge of the County Court, when the order appointing the plaintiff guardian of the defendant in error was made, and who, for aught that appears, may have directed the order, and must in our opinion be regarded as having at least participated in the appointment, although the record appears to have been signed by the presiding Judge alone, and this latter circumstance is relied upon by the plaintiff in error, as establishing the fact that his appointment was made by the Probate Court, instead of the County Court, as stated in the caption of the record; but it does not, in our opinion, warrant this conclusion; because it is generally known to be the uniform practice of all courts of record, to state in the caption or commencement of the record of their proceedings, the style of the court, and the name or names of the person or persons sitting in, or holding the court, with his or their official character or style, substantially, if not literally, in the manner and form observed in the record before us; and it is a fact, equally notorious, that the records are not uniformly, or generally, signed by every member of the court, when it is composed of several persons, or has, by law, one presiding officer, in which case it is not unusual for him alone to sign the record of their proceedings; and when any member of a court is once shown by the record to have taken his place on the judicial seat, upon any particular day, of any term of the court, his presence and participation in all of the business transacted in court during that day must be presumed, until the contrary is proved, which does not appear to have been even attempted in this case; we, are therefore bound to presume that Allen McLain and Richard C. Hawkins, Esqrs., were present, with David Fulton, the presiding Judge of the County Court, acting officially with him when the appointment of Heilman as guardian of the defendant in error was made. Another consideration intimately connected with this view of the question, which is in our opinion entitled to some influence in determining the question now under consideration, is that by law as we have already shown, the Court of Probate must have been held by a single Judge; but three persons

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are proven to have occupied the judicial seat when the order and appointment under consideration were made; and, therefore, they could not have been made by the Court of Probate, and must be regarded as having been made by the County Court, a tribunal possessed no jurisdiction over the subject.

If the view which we have taken of the propositions just disposed of be correct, as we are satisfied it is, there can be no doubt that the Circuit Court, from the circumstances, as shown by the record before us, properly refused to suffer the order to be read to the Jury as evidence for the plaintiff in error, upon the issue joined, because it was made by a court not possessed of jurisdiction over the subject matter, and was therefore void, and the parties never did, by virtue thereof, stand in the relation to each other, of guardian and ward; but the result would not, in our opinion, be different, if that relation had legally subsisted between them when the services were rendered, and the labor performed; for that relationship does not, according to the common law, or any law in force here, in itself, oblige the ward to labor or perform menial, or other valuable services for the benefit of his guardian, or authorize the latter to receive, for his own use, the value of his earnings, whether they accrue under an employment in the service of his guardian, or some other person. Chancellor Kent, treating of the office of guardian, says emphatically, "the guardian's trust is one of obligation and duty, and not of speculation and profit." 2 *Kent's Com.* 187. And the truth of his remark no one will question, who has examined the subject, and maturely considered the nature and object of the appointment; and notwithstanding the ward could not, at common law, maintain an action at law against his guardian until he come of age, he was at common law liable to an action of account after the infant came of age, and the infant, while under age, might by his next friend, call the guardian to account by bill in chancery, but the personal disability of the ward to sue his guardian must, as we apprehend, have been taken advantage of by pleading it in abatement of his suit, and it never could have been available as a defence upon the general issue, because it is simply a matter in abatement, and could not constitute a legal bar to the right of action, after the infant came of age; which would be

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the effect of admitting it in evidence on the general issue, and it is therefore both irrelevant and incompetent testimony for the plaintiff in error upon this issue; consequently the court did not err in rejecting the evidence offered by the plaintiff in error.

The third and fourth questions presented by the record and assignment of errors, are based upon the assumption that the action is misconceived; and may with propriety be considered together. The former assumes that the defendant in error has a higher security in the bond executed by the plaintiff as his guardian, and the latter asserts that his demand is merely equitable, and no action at law can be maintained upon it. We have already decided that Heilman's appointment as guardian of Martin is void, and that the relation of guardian and ward, never legally subsisted between them by virtue thereof, and, therefore, upon the principle decided and acted upon by this court in the case of *Ashley vs. Brazil and Lindsay's Ex'rs.*, 1 Ark. Rep., 144; the bond is void, and no action whatever could be maintained upon it; in addition to which, we consider it doubtful at least, whether the defendant in error could, by an action on the bond, if it was valid, recover upon the express or implied promise of the plaintiff to pay him for his services and labor; the right of action not falling within the scope of any stipulation either expressed or implied in the condition of the bond; which simply binds the plaintiff to a due and proper performance of his duties as guardian, but does not impose upon him any obligation to pay for the service and labor of his ward, which is a matter in no wise connected with his trust, or the due and proper performance of his duties as guardian. But, suppose we are mistaken in this view of the subject, still the plaintiff in error cannot avail himself of this objection to the present suit, because the bond does not appear to have been offered or admitted as evidence on the trial, nor is the existence of such bond, in any manner, legally shown by the record; such a bond, it is true, has been transcribed by the Clerk, as part of the record returned to this court with the writ of error, yet it is not by any legal means made a part of the record of this case, and the Clerk, in so transcribing it, transcended his authority, and violated his duty, which was to make out and certify according to law, a true and complete transcript

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of the record of the case; and nothing more, but this act of the Clerk, could not confer, on either party, the right to any advantage by reason of its existence, or justify the court in regarding it as legally entitled to any consideration in the case. The latter position assumed by the plaintiff in error, that the demand for which he is sued is equitable merely, is founded upon the presumption that he was legally guardian of Martin when the services were rendered, and the labor performed, for which he is sued in this action, has no foundation whatever, since he has wholly failed to prove that fact, or establish the legal existence of that relation; whatever consideration it might have been entitled to receive, if that relation had been established; we cannot, therefore, regard the action as misconceived.

The only question remaining to be decided is, whether the Circuit Court had jurisdiction of the case, and authority to pronounce judgment therein, for the damages assessed by the jury, and costs of suit, the action sounding in contract, and the damages assessed being a less sum than one hundred dollars; this question depends entirely upon what shall be considered as the sum in controversy, contemplated by the Convention when they use that language in defining and prescribing the respective jurisdiction of the Circuit Court and Justices of the Peace in matters of contract in the Constitution. On the part of the plaintiff, it is urged that the sum in controversy is ascertained by the verdict, which, being for a less sum than one hundred dollars, the Circuit Court had no jurisdiction of the case, and could not legally pronounce any judgment therein; which is denied by the defendant, who insists that the damages claimed in his declaration must be regarded as being the sum in controversy. The *Constitution*, art. VI., sec. 3, ordains "that the Circuit Court shall have original jurisdiction of all civil cases; which shall not be cognizable before Justices of the Peace, until otherwise directed by the General Assembly; and original jurisdiction in all matters of contract *when the sum in controversy is over one hundred dollars.*" And the 15th sec. of the same article, amongst other things, declares that Justices of the Peace "shall have individually, or two or more of them jointly, exclusive original jurisdiction in all matters of contract, except in actions of covenant, when the sum in controversy is one hundred dollars and under." These

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fundamental ordinances definitely prescribe the jurisdiction respectively, of the Circuit Court and of Justices of the Peace, in matters of contract. They confer upon the former original jurisdiction of all matters of contract when the sum in controversy is over one hundred dollars, and upon the latter, the exclusive original cognizance in all matters of contract, except in actions of covenant, when the sum in controversy is one hundred dollars and under. The line of separation between their respective jurisdictions, in this respect, is clearly drawn and unalterably fixed, until the Constitution shall be abrogated or amended, and the only difficulty is to determine, upon satisfactory reasons, what shall be regarded as being the sum in controversy, within the spirit and meaning of the Constitution, and by what criterion it is to be ascertained; does the verdict furnish the true rule by which the sum in controversy is to be ascertained in a court of original jurisdiction? In our opinion it does not. It may determine the controversy, or ascertain the respective rights of the parties in the subject matter of the controversy; but, it cannot, in the nature of things, indicate or decide what sum was originally in controversy between them; unless that matter be directly put in issue by a plea to the jurisdiction, setting forth, in legal form, and in a proper manner, such facts as are sufficient in law to exclude the court from exercising jurisdiction of the subject matter of the controversy; which can only be necessary in cases where the facts, as set forth by the plaintiff, present a case within the jurisdiction of the court, although the true and real subject matter of the controversy is not within its jurisdiction; and in this class of cases, if no sufficient plea to the jurisdiction is interposed, we have no doubt that the Circuit Court has a legal right to the adjudication, and is bound by law to exercise jurisdiction over the subject, and pronounce final judgment between the parties, notwithstanding the verdict may be for a less sum than one hundred dollars, or, in favor of the defendant; in which case, if the sum in controversy must be ascertained by the verdict, no judgment conclusive upon the parties, or the subject matter of the adjudication, could ever be pronounced, nor could any valid judgment be given even for the costs of suit, and the plaintiff would be at liberty to review the same controversy in the same, or some other court, and harass, and vex, and

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oppress the defendant according to his own pleasure, unless restrained by a court of equity, contrary to justice, and the whole spirit and genius of our laws and institutions; notwithstanding the controversy had been previously decided against him upon its merits, and no previous adjudication upon the matter, could ever be interposed as a bar to the subsequent proceeding, because, being *coram non judice*, it would be void. No rule, attended with consequences so unjust and absurd, can constitute the true criterion for ascertaining the jurisdiction of the court. But, independently of this, it would be a very inconvenient, uncertain, and unsatisfactory rule, because the parties would, in many cases, be subjected to all the trouble, expense, and anxiety incident to a vexatious and protracted litigation before they could, by possibility, know whether the court had jurisdiction of the controversy or not, and then, after passing through all the forms of law to a final trial of the case, be compelled to resort to a different tribunal, where similar proceedings might, and very probably would, be attended with the same result, and thus, the administration of the law would be rendered so uncertain and perplexing, and be attended with so great delay, as, in many cases, to amount virtually to a denial of justice, the verdict depending, as it always must in the very nature of things depend, upon a great variety of circumstances and facts which are seldom, if ever, alike upon two or more occasions, must be ever subject to vary with the change of circumstances, and facts presented in combination at each trial; and, consequently, one jury might find, and be justified too in finding, a very different verdict from that which another would be warranted in finding upon another trial of the same controversy; and, therefore, we are satisfied that the verdict, when no plea to the jurisdiction is interposed, cannot be regarded as ascertaining the sum in controversy, by which the jurisdiction of the court, in matters of contract, must be determined.

By what rule then is the question of jurisdiction to be determined in matters of contract? In the investigation of this question, we have experienced considerable difficulty in coming to a just and satisfactory conclusion. We are, however, satisfied, upon the most mature consideration of the subject, that in all actions, (except covenant,) where the law limits and especially prescribes the precise sum

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which may be recovered, upon the cause of action set forth in the plaintiff's declaration, petition, or statement; and such cause of action, as therein stated, presents a liability or demand exceeding one hundred dollars, exclusive of interest, which if admitted or proven, the plaintiff, is legally entitled to recover. The Circuit Court has jurisdiction, and is justified in pronouncing final judgment upon the controversy, if no sufficient plea to the jurisdiction be interposed by the defendant; but if such plea be put in, and it appears upon the trial thereof, that so much of the plaintiff's demand, as reduces it to a sum not exceeding \$100, is altogether unfounded or fictitious, or has been paid, or otherwise legally discharged or satisfied; so that the real sum in controversy does not exceed the sum of \$100, the suit must be abated, the Circuit Court having no jurisdiction of the matter. And this rule applies to all actions upon liquidated demands, actions of indebtedness assumpsit, and all other actions and proceedings where the law limits and specially prescribes the sum which may be legally claimed and recovered upon the contract as set out or presented by the plaintiff, and no discretion is left with the court or jury as to the amount to be recovered, if the contract be admitted, or proved as stated; but, in every case, where the law does not limit and specially define what particular sum may be recovered upon the contract, but leaves it in the discretion of the court or jury to determine what amount the plaintiff ought to have for the non-performance of the contract, as set out, or presented by the plaintiff; as, for instance, in the action of assumpsit for the breach of contract to marry, and the like, in which the damages, or sum which may be recovered, are unliquidated and uncertain, and are not specially limited or prescribed by law, the damages claimed in the declaration or proceeding, being the only legal limit to the plaintiff's right, beyond which he cannot legally recover, constitutes the sum in controversy, and, in itself, determines the question of jurisdiction, in this respect, beyond all controversy. By applying the principles, above stated, to the case under consideration, it appears manifestly, that the Circuit Court had jurisdiction of the subject; each contract, or legal liability, upon which the action is founded, as set forth and put in controversy by the plaintiff, and, in fact, controverted by the defendant in the court below,

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being for a sum exceeding one hundred dollars. Wherefore, it is the opinion of this court, that there is no error in the proceedings and judgment of the Circuit Court of Pulaski county in this case, for which they ought to be reversed, but that the same ought to be, and hereby are, in all things affirmed with costs.

*TAYLOR, and others, against the AUDITOR.**ERROR to Pulaski Circuit Court.*

The act of 1836, authorizing the Auditor of Public Accounts "to sue for any demand which the people of the State may have a right to claim," &c., was in force on the 7th of September, 1838, and authorized him to sue, as Auditor, on a Sheriff's bond, given to the Governor and his successors in office.

But his right, so to sue, depends upon the interest which the State, or people, have in the debt, or thing demanded, and their right to claim the same; and, therefore, the people's interest in, or right to claim the demand, must appear by some appropriate averment in the pleadings, to enable him to maintain the action.

Where, therefore, suit is brought by the Auditor, for the use of the State, and he declares for the penalty of a Sheriff's bond, given to the Governor and his successors in office, a copy of which bond, with the condition, is given and accepted as oyer, and the only material averments in the declaration, tending to show his right to sue, are, that he is Auditor; that he sues as Auditor for the use of the State, and that by virtue of the statute an action has accrued to him as Auditor to sue for the penalty of the bond, for the use of the State; the declaration shows no legal right in the people of the State to claim the debt demanded.

The right of the State to sue in such case, not appearing in the declaration, it is bad on demurrer, in arrest of judgment, or on error; and a demurrer to it should, for this cause, have been sustained, although it was not specially stated as ground of demurrer.

The failure of an officer to obtain an approval of his official bond, as required by the statute, does not affect his liability or that of his securities; if it was otherwise legally executed and delivered.

Where a joint and several co-obligor was not sued, and it appeared from the declaration that he was still living, it was good ground of general demurrer at common law; and may, perhaps, be a valid objection to a declaration in a suit commenced before the adoption of the Revised Code; where it does not appear in the declaration that the obligors reside in different counties; for if such be the case, the plaintiff should show it by proper averment in the declaration, in order to sue part, and not all of the obligors.

But the objection that parties who ought to be joined were omitted, was not available, even at common law, on demurrer, unless it appeared in the declaration that they were still living. If this did not appear, the objection could only be taken advantage of by plea in abatement.

Where only part of the co-obligors in a bond are sued, it is not necessary to mention those who are not sued, in the declaration; and if mentioned, it is not necessary to aver that they have not paid the bond. Nor is it necessary, in such suit, to aver any demand or request of payment.

And as the objection for non-joinder cannot be taken on demurrer, unless it appears in the declaration that the party not sued, both signed and sealed the obligation and is still living, therefore, if he is alleged to be dead, it is not necessary to state that he executed the obligation.

A Sheriff's bond, given to the Governor and his successors in office, does not vest in him or his successors any beneficial interest in such contract. He takes simply the legal interest, and a naked trust.

Neither the Governor or Auditor can receive or release the debt, or change or discharge the obligation; nor can the Auditor discharge the legal liability of any person to the State, except in the manner prescribed by law, after payment or satisfaction of the demand has been made to such officer as is authorized to receive it.

A suit commenced by the Auditor, when he was authorized by the act of 1836, to bring such suit, and in which judgment obtained by him is reversed, after he is divested of such right to sue, may still proceed to final judgment in his name, after its return to the Circuit Court upon reversal.

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This was an action of debt, founded on the official bond of the defendant, Taylor, as late Sheriff of Pulaski county, and his securities, against all of whom, except Benjamin Williams, who is alleged not to be sued in this action, and James Lowery, who in the *queritur* of the declaration, is alleged to be dead, the defendant who was plaintiff in the Circuit Court, in his official character as Auditor of Public Accounts, declares for the penalty of said bond, as follows, to wit: "for that whereas heretofore to wit, on the eighth day of October in the year of our Lord one thousand eight hundred and thirty-three, at, &c., to wit, in the county of Pulaski, aforesaid, and within the jurisdiction of this court, they the said defendants, together with one Benjamin Williams, who is not sued, by their certain writing obligatory, sealed with their, and each of their respective seals, which is now here to the court shown, the date whereof is the day and year last aforesaid, acknowledged themselves jointly and severally held and firmly bound unto John Pope, then and there Governor of the Territory of Arkansas, and his successors in office, in the just and full sum of fifteen thousand dollars above demanded, to be paid to the said John Pope, then and there Governor of the Territory of Arkansas, and his successors in office, which said writing obligatory was, and and still is, subject to certain conditions thereunder written." The plaintiff below, then "avers that he is Auditor of the State of Arkansas, duly elected, commissioned, and qualified as the law prescribes, by means whereof, and by force of the statute in such case made and provided, the right of action hath accrued to him, the said Elias N. Conway, Auditor of Public Accounts of the State of Arkansas, who sues for the use and benefit of the State of Arkansas, as Auditor aforesaid, to have, demand of, and sue the said defendants, for the use and benefit of the State of Arkansas, for the sum of fifteen thousand dollars above demanded," and assigns as a breach, "that they, the said defendants did not, nor did either of them pay unto John Pope, Governor of the Territory of Arkansas, nor to William S. Fulton, Governor of the Territory of Arkansas, who was the successor of John Pope, late Governor of the Territory of Arkansas, nor unto James S. Conway, Governor of the State of Arkansas, who is the successor of William S. Fulton, late Governor of the Territory of

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Arkansas, during their continuance in office, as aforesaid, the said sum of fifteen thousand dollars, demanded as aforesaid, or any part thereof; nor have they, the said defendants; nor their said co-obligor, Benj. Williams, nor their said deceased co-obligor, James Lowery, or either of them, although often requested so to do, paid unto the said Elias N. Conway, Auditor of Public Accounts of the State of Arkansas, who sues for the use and benefit of said State of Arkansas, as Auditor, since the right of action, (by force of the statute, in such case made and provided,) hath accrued as aforesaid, said sum of fifteen thousand dollars, demanded as aforesaid, or any part thereof, but this to do, they, the said defendants have, and each of them hath hitherto wholly refused, and still doth refuse and fail to pay the said sum of fifteen thousand dollars demanded as aforesaid, or any part thereof, to the damage of the said plaintiff, for the use and benefit of the said State of Arkansas, five thousand dollars, and, therefore, for the use and benefit of the State of Arkansas aforesaid, he brings his suit, &c.

The process issued against the defendants named in the declaration appears to have been executed on Taylor, Cummins, and Clemens only, Cook and Roland, not being found to be served therewith. And the said defendants who were served with process to appear, entered their appearance at the October term, 1838, of the Circuit Court to which said process was returnable, and demurred to the plaintiff's declaration, which being joined, was overruled by the court, whereupon the plaintiff asked and obtained leave to amend his declaration, and filed the same as amended, on the 29th January, 1839. At the next term the defendant, Taylor, cravedoyer of the obligation declared on, which was granted by filing a certified copy of the original, whereupon the defendants demurred to the declaration as amended, and issue being joined thereto, the demurrer was sustained; the plaintiff again amended his declaration by leave of the court, and the cause was continued, and at the September term, 1839, of the court below, the defendants again demurred to the declaration, and specially expressed therein. 1st. That "the said Elias N. Conway, as Auditor aforesaid, has no legal right, as such, to institute suit upon said supposed writing obligatory, in his own name as such Auditor.

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2nd. No action can be sustained upon said supposed writing obligatory, because the same was never acknowledged and approved according to law. 3rd. That said supposed writing obligatory given on oyer, varies materially from that described in said declaration. 4th. Because, by the law of the land, suit upon such supposed writing obligatory could only be sustained against all, or but one of said obligors; whereas, suit, in this case, is brought against only a part of the obligors, leaving out James Lowery and Benjamin Williams, two of the co-obligors in this writing, without any averment that said Williams is dead. 5th. Because there is no averment in said declaration that the said Benjamin Williams and James Lowery, did not pay said supposed debt to the said John Pope, William S. Fulton, and James S. Conway, Governors as aforesaid, or either of them; nor is there any averment that said James Lowery ever executed said writing obligatory. 6th. Because it is not alleged in said declaration that the said Williams and Lowery have hitherto wholly refused, and still do refuse, to pay said supposed debt, or any part thereof, to the said Elias N. Conway, Auditor as aforesaid, to wit: up to the time of the institution of this suit. 7th. Because no request is sufficiently averred in said declaration.

This demurrer was also joined by the plaintiff, and upon argument overruled by the court, and the amended declaration, which is substantially set forth and stated above, adjudged sufficient; and, thereupon, judgment by *nil dicit* pronounced for the plaintiff, for fifteen thousand dollars, the debt in the declaration mentioned, and one cent damages for the detention thereof, with the costs of suit. The plaintiff then filed his suggestion of breaches of the condition of the bond sued on, and a writ of enquiry was awarded, returnable instant; whereupon a jury was "empannelled, and sworn, well and truly to enquire and assess the damages," which returned a verdict as follows, "we, the jury, do find the suggestion of the breaches assigned, to be true, and assess the plaintiff's damages at the the sum of seven hundred and forty dollars, together with the further sum of one hundred and sixty-seven dollars and seventeen cents for the interest for the sum, together with costs of suit," upon which another formal judgment for the several sums mentioned in the verdict, was entered for the plaintiff, and

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“execution therefor” awarded. Upon the inquest of damages taken on the suggestion of breaches filed, the defendants objected to the evidence, adduced by the plaintiff, going to the jury, but their objections were overruled and they excepted to the opinion of the court, and by the bill of exceptions, which is signed and sealed by the court, spread on the record, all of the evidence offered or given in the case to the jury.

FOWLER & PIKE, for plaintiffs in error.

The questions presented by this record, we take to be as follows:

First. Whether the declaration shows upon its face any legal right in the plaintiff to bring the suit.

Second. Whether, where one obligor is dead, suit on a bond can be instituted against more than one of the obligors, without joining all the obligors who are living.

Third. Whether a Sheriff’s bond is valid, so that a suit can be sustained upon it, when it is neither approved by the County Court, nor recorded according to law.

Fourth. Whether, on other grounds, the demurrer should have been sustained, and this includes an examination of the grounds assigned in the demurrer, and also of the further grounds of objection, that the declaration does not show that Lowery ever executed the bond, nor that William Cummins ever executed it.

Fifth. Whether it is error, that no order was made that the truth of the breaches be inquired into, and the damages sustained thereby assessed.

Sixth. Whether the jury should have been sworn to find whether the assignment of breaches was true.

Seventh. Whether the verdict and judgment, each being for *several* sums in damages, are good in law.

Eighth. Whether the judgment directly for the damages is correct, or whether there should have been judgment for the penalty, and a further judgment that the plaintiff have execution for the damages assessed.

Ninth. Whether the assignment of breaches is sufficient.

Tenth. Whether, under the Constitution, judgment can be ren-

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dered against the securities of a Sheriff for *penalties* imposed upon him by law, as contradistinguished from *interest*.

We will examine the most important of these questions in the order in which they are presented.

First, then, does the plaintiff show upon the face of his declaration, a legal right to sue upon the bond declared on; or, in other words, that he is properly a party to the suit?

He claims this right under the provisions of "an act directing in what courts and manner suits may be commenced by and against the State, and for other purposes," approved, and in force, Nov. 8, 1836. By the first section of this act, it is provided, "that it shall, and may be lawful for the Auditor of Public Accounts of the State of Arkansas, to sue in the Circuit Court, for any demand which the people of the State may have a right to claim; and to be sued and to sue, to plead and be impleaded, to answer and to be answered, to defend and be defended, in said Circuit Court, in the name of the Auditor of Public Accounts, for the State of Arkansas." And, before we proceed to consider the bearing of this act upon the present case, generally, we may remark that the suit here is *not* brought "in the name of *the Auditor of Public Accounts*," but in the name of E. N. Conway, as Auditor of Public Accounts.

But admitting the plaintiff to be properly named and described, and admitting that the Auditor could sue under this law, at the time when he did sue, (which we shall hereafter contest,) let us inquire whether the declaration, upon its face, shows the Auditor's right to sue. The ground of action, in the declaration, is stated to be the execution of a bond by the defendants to Pope, Governor, and his successors; and it is alleged that the Auditor sues on that bond for the benefit of the State: that the right of action has accrued to him "by virtue of the Statute;" and the breach is that the defendants have not paid the \$15,000, the penalty of the bond, to Pope or his successors, or to the Auditor, since his right of action accrued.. These are all the allegations in the declaration. What right of action do they show to exist in the Auditor? To be sure, it is alleged that he has a right of action, but it is necessary to show *how* that right of action arises. To give the Auditor any such right, the *demand* must be one

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which the people of the State have a right to claim. What demand is shown in the declaration? Simply a demand for \$15,000, upon bond given to Pope and his successors. The bond is stated to be accompanied by conditions—but what these conditions are is not stated. It is not alleged that the \$15,000 is owing to the State. It is not alleged that Taylor was Sheriff, or that the bond was an *official* bond, under which a right of action could accrue to the State, or, taking this all for granted, still, it is no where alleged in the declaration that Taylor was indebted to the State, and so the State had a demand against him, secured by the penalty of his bond. In order, therefore, to sustain the Auditor in this suit, the court must infer, *first*, that Taylor was Sheriff; *second*, that the bond was his official bond; and *third*, that he was indebted to the State as an officer, for some default covered by his bond. These inferences, we contend cannot be made; and we do not see how it is to be argued that this suit can be sustained unless they are made. It seems to us, that in order to have shown the Auditor's right to sue on this bond, it would have been necessary to have stated the breaches in the declaration, and to have alleged Taylor's indebtedness to the State for moneys collected during the life of the bond. If this had been done, then there might have been some plausible ground for this suit. But where the Auditor sues on a bond given to Governor Pope, without showing any interest which the State has in the bond, except by alleging that the suit is for her use and benefit, his right to sue cannot be said to appear in the declaration.

We further contend that, even if we are mistaken as to this point, still this case does not come within the scope of the act. By that act, he is authorized to sue *for any demand which the people of the State may have a right to claim.* We know of no rule of construction by which this language can be so extended as to authorize him to sue on any instrument to which the State is not a party, although she may be beneficially interested therein, as every individual in the county, or who has had dealings with the Sheriff, also is. Suit may be brought on this bond, in the name of the Governor, for the use of any individual having a cause of action against the Sheriff and his securities: and so in the present case the Governor might have sued,

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for the use of the State; and, perhaps, for the use of the Auditor of Public Accounts. Undoubtedly, the Legislature might have enacted that the Auditor should have the right to sue on this bond, as successor to Governor Pope, but they have not done so. They have not changed the *legal* liability upon such bonds, and therefore the general rule of law must hold, that the action on a contract, whether express or implied, by parol, under seal, or of record, must be brought in the name of the party or person in whom *the legal interest* is vested.
1 *Chit. Plead.* 3.

Moreover, the act in question cannot be construed to apply to bonds previously executed to the Governor of the Territory, unless it expressly included them; because, by section 4, of the Schedule to the Constitution, it is provided that "all bonds executed to the Governor of the Territory, or to any other officer or court, in his or their official capacity, shall pass over to the Governor, or other State authority, and their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly." And, as by this provision, the *legal interest* in this bond was vested in the Governor of the State and his successors, it could not be divested unless by direct words or strong implication.

But, furthermore, the act in question was *repealed* by the 9th sec. of chap. xviii, of the Revised Statutes, by which it is made the duty of the Auditor "to direct prosecutions *in the name of the State*, for all official delinquencies, &c., and against *all* debtors of the State:" which was in force Dec. 14th, 1838; and also by sec. 4, of chap. cxlvii., by which it is provided that "all actions in favor of, and in which the State is interested, shall be brought *in the name of the State*. The writ in this case issued on the 7th day of September, 1838, but no sufficient declaration was filed until long after the chapter concerning Auditor and Treasurer, and suits by and against the State, in the Revised Statutes were in force; and at a time, of course, when the Auditor was expressly required to bring *all suits* against debtors to the State, in the name of the State.

This point alone is so conclusive, that it is almost unnecessary to argue the other questions presented; but as some of them are mate-

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rial to our rights, or will become so in a future action, if one should be brought, we proceed to consider;

Second, whether this suit should not have been brought against *all*, or *one only*, of the obligors living. The rule, on this point, is laid down by Chitty to be, that "if there be more than two parties to a joint and several contract," (and all bonds by our law are joint and several,) "as where three obligors are jointly and severally bound, the plaintiff must either sue them all *jointly*, or each of them separately." 1 *Chit. Plead.* 30. So in *Streatfield vs. Holliday*, 3 *T. R.* 782, *Buller, J.* said, "if three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all, or each of them separately." And though that doctrine has been several times questioned, yet it has been held good law from the time of Lord COKE." This decision is quoted in *Sergeant Williams'* note to *Cabell vs. Vaughn*, 1 *Saund.* 291, *e*; and he adds that *Buller* might have said from the time of Henry VIII; and he further lays it down to be the ground of plea in abatement, but not of non-suit, contrary to the case of *Gaulton vs. Challiner* and *Wilkinson, Stafford Lent Assizes*, 1794; but in this case it appears upon the face of the declaration that *Williams*, a co-obligor, is not sued, and of course it was unnecessary to plead it in abatement, for it was a good objection on demurrer. In *South vs. Tanner*, 2 *Taunton*, 255, where two of three obligors being sued, pleaded *non est factum*, it was held that to prove that there was a third obligor who was not sued, did not sustain the issue—but it was admitted that if the objection appeared on the face of the declaration, it would be good in arrest of judgment: and the rule is well known that nothing is good in arrest of judgment, which would not have been a good objection on demurrer. On this point, reference was made by *Lawrence, J.*, to the case of *Horner vs. Mow*, quoted in *Rice vs. Shute*, 5 *Burr.*, 2614. In that case *non est factum* was pleaded, and the jury found it to be the deed of both. It was then moved in arrest of judgment, *upon the face of the declaration*; the plaintiff's counsel gave it up, and it was arrested. See *Gould*, 206; *Vanderbergh vs. Blake*, *Hard.* 198.

The third point we present for the consideration of the Court without argument. By sec. 1, of the act of 1829, *Ter. Dig.*, 158, *She-*

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riff's bonds are to be approved by the County Court, and by the act of 1813, such bonds are required to be recorded. Ter. Dig., 518.

As to the matters to be considered under the fourth head, touching the sufficiency of the declaration, it is undoubtedly a fatal defect, that there is no averment that neither Williams nor Lowery had paid the amount mentioned in the bond, to Pope, Governor, or his successors in office. It is a universal rule, that the breach must be *co-extensive* with the contract, and not *too narrow*. Thus in an action by assignee, heir, or executor, the breach should be that the defendant did not perform the act, either to the original contractor or the plaintiff; and so, if against an assignee, heir, or executor, the breach should be that neither the original contractor, nor the defendant performed the act. And a declaration by husband and wife, or by an administrator, merely stating that defendant did not pay before marriage, or that he did not pay since the death, is bad. 1 *Saund. Plead and Ev.*, 134; *Elstob vs. Thoroughgood*, 1 *Ld. Raym.* 284. So in sci. fa., on a recognizance of bail, and moved that if A. and B. be condemned they shall pay, or render, after an allegation that A. was condemned, it is not sufficient to say that A. and B. did not pay, or render, without adding "nor did either of them." Per *Ellenborough, C. J.*, *Le Blanc and Bayley, J.*, in *Wilkinson vs. Thorley*, 4 *M. and S.* 33. And the rule is that a defective statement of the breach, so that the contract does not affirmatively appear to be broken, is bad after verdict; or, at any rate, on demurrer, 1 *Saund. Plead. and Ev.* 135; *Lunn vs. Payne*, 6 *Taunt.* 140; *Siclemore vs. Thistleton*, 6 *M. and S.* 9. Sec. 1 *Chit. Plead.* 327, 328. In the present case, the declaration shows that Williams and Lowery were bound equally with the defendants to pay the sum mentioned in the bond, to Governor Pope and his successors; and there is no allegation that they have not done so. Of course, the breach is not co-extensive with the contract. *Vide*, case of *Campbell and wife vs. Wm. Strong*, decided by late Superior Court.

The declaration, taken in connection with the bond, which on oyer became a part of it, is also defective, because it does not appear that William Cummins ever executed the bond. The name of William

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Cummins is attached to it, but it is not stated in the declaration that he signed it by that name.

The fifth and sixth points presented, are governed by the 7th sec. of chap. cxii. of the Revised Statutes, which provides that in all suits upon such bonds as the present upon judgment for the plaintiff, upon demurrer, by confession or by default, "the court *shall* make an order therein, that the truth of the breaches assigned be inquired into, and the damages sustained thereby assessed." It follows of course that such order should have been made, and the jury sworn to find whether the assignment was true—neither of which was done in this case. The eighth point is also settled by sec. 8 of the same chap.; by which it is provided that judgment *shall be* entered for the penal sum mentioned, *as in other actions of debt*, with costs, and with a further judgment that the plaintiff have execution for the damages assessed.

As to the ninth point presented, it needs but a glance at the assignment of breaches, to see that it is entirely insufficient. It states, to be sure, that Taylor would not pay to the Auditor or his predecessors in office certain sums of money; but it does not state that those sums have not been paid by the other defendants. It states that he has not paid \$148, the damages in accordance with law for the detention of the revenue; but it does not state, it does not show, at what rate or in what manner these damages are calculated. It claims interest on the same, *in accordance with* the Statute, but does not state at what rate, or when to commence.

That the *penalty* imposed by law on the sheriff, cannot constitutionally be collected of his securities, was decided by the constitutional law of South Carolina, in *The State, vs. Harrison, Rep. Const. Ct.*, 89, where her Justice Nott, after deciding that the securities to pay interest at the rate of fifteen per cent. for which their principal was liable by law, said, that if it was a *penalty* imposed upon the tax collector for neglect of duty, he should be of opinion, it could not be visited upon his securities. They bind themselves that he will perform all the duties of sheriff, and if he does not, they are answerable for all damages sustained by his misconduct, either by the State or individuals. Where he collects and retains money, those damages

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sustained by the person entitled to the money, are, the amount of money retained, with legal interest thereon. That legal interest may be higher in the case of the State than of an individual, and five per cent. a month, or sixty per cent. a year, is certainly high enough. But the penalty of twenty or twenty-five per cent., (for, which it is, the declaration is not kind enough to inform us,) is like a fine or forfeiture imposed as a punishment on the individual, and does not enter into the contract to which his securities are parties. If sued for this, they have the right to say *non in haec foedera venimus*; as much as if it was attempted to make them pay, by suit on the bond, a fine imposed on the Sheriff for misdemeanor in office.

And this equitable principle is equally enforced in the civil law. Thus a person who becomes surety for an administrator of the public revenues, is only obliged for the restitution of the public money, and not for the penalties to which the administrator may be condemned for malversation. This was decided by the Emperor *Severus*: *fide jutores magistratum in poenam vel multum non conveniri debere decrerit. L. 68, ff. dic. tit.*, and in general the engagement does not extend to the penalties to which the debtor has been condemned, *officio judicis, propter suam contumaciam*; for this is a cause extrinsic to the contract: *non debet imputari fide jutoribus quod ille reus propter suam poenam prestitit. L. 73, ff. dic. tit. (a.)* See 1 *Evans' Pothier*, 405.

CLENDENIN, *Contra*:

The authority to sue one or all or a part of the obligors to a joint and several writing obligatory is derived from p. 312, *Steele and McCampbell's Dig.*, which is as follows, "and in all cases, hereafter, when the obligor or obligors, maker or makers, of any note, bill, or bond, or other contract, reside in different counties, it shall be lawful for the plaintiff or plaintiff's to institute a suit against *all*, or as *many* of them as he may think proper." The plaintiff's in error, in this case, it will be seen, on reference to the record, were residents of different counties, and the plaintiff elected to sue a portion of them, stating who was deceased and who was not sued. The bond, upon which suit was brought, was regularly approved and recorded, as will

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more fully appear by a reference to the certificate of the Clerk of Pulaski county accompanying the grant ofoyer in this case made.

This is a case depending so entirely upon the statutes of this State referred to before, and the records of the case now before the court, that it is thought unnecessary to trouble the court with any further authority, upon the points assigned for error in the brief of the plaintiffs in error, most of which it is conceived will be contradicted by a reference to this record of the Circuit Court, filed in the court in this above entitled case.

All of which is respectfully submitted.

Ringo, *Chief Justice*, delivered the opinion of the Court:

The plaintiffs, by their assignment of errors, present as error in the proceedings and judgment of the Circuit Court more than thirty matters, which, or as many of them as may be deemed material, will be considered, and the questions arising upon them disposed of by the court.

The first question arising upon the record and assignment of errors is this; is the declaration sufficient in law to enable Conway, as Auditor of Public Accounts of this State, to have and maintain this action against the plaintiffs in error? In considering this question, we will first examine and dispose of the several matters specially stated in the demurrer to the declaration. The first ground of demurrer, so stated, denies the legal right of the Auditor of Public Accounts to sue in his individual name and official character upon the bond mentioned in the declaration. This right depends upon the provisions contained in the Statute approved Nov. 8th, 1836, "entitled an act directing in what courts and manner suits may be commenced by and against the State, and for other purposes," which was in full force on the 7th day of September, 1838, when this action was commenced. See *Acts* 1836, p. 195. The first section, of said act, declares "that it shall and may be lawful for the Auditor of Public Accounts of the State of Arkansas, to sue in the Circuit Court for any demand which the people of the State may have a right to claim; and to be sued and to sue, to plead and be impleaded, to answer and be answered, to defend and be defended, in said Circuit Court, in the name of the Auditor of Pub.

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lic Accounts for the State of Arkansas." The right of the Auditor to sue in his own name and official character, upon a bond payable to the Governor, and his successors in office, by virtue of the provisions of the statute above quoted, was made a question before this court, in the case of Conway Auditor, &c., *vs.* Woodruff, *et als.*, decided at the last term, between which, and the case under consideration, no essential difference is perceived or believed to exist in regard to this question; and it was then held, that an action so brought, could be legally maintained, and we have not, as yet, discovered any reason to doubt the correctness of that decision, or the reasons upon which it is based, but no question as to what averments in the declaration are in such cases necessary to show the right of the people, or interest of the State, to the demand in suit, was, in that case, discussed or examined by the counsel, or the court. The authority of the Legislature to make the enactment, and the right of the Auditor derived from it, to maintain the action in his own name and official character, upon a contract or bond made directly payable to the Governor and his successors in office, being the only questions material to the present case, then discussed and decided, the court deemed it unnecessary to discuss the question then, as it was not adverted to, or relied upon, by the counsel for the defendants, and was not important, inasmuch as the judgment of the Circuit Court must have been affirmed upon a different ground, whatever might have been the result upon such investigation; and, therefore, it was silently passed over. But the same question arises on the demurrer to the declaration in the present case, and the plaintiffs in error insist that the declaration wholly fails to show any interest whatever of the State, or people, in the bond sued on, or the money demanded, and sought to be recovered, by the suit. It is therefore important to ascertain what legal right the plaintiff has shown, in the State, or people of the State, to claim the debt demanded of the plaintiffs in error; for it cannot, in our opinion, be denied that the Auditor's right to sue or maintain the action under the statutory provisions above quoted, upon the interest which the State or people have in the debt, or thing demanded, and their right to claim the same, and his right to sue is expressly limited to "any demand which the people of the State have a right to claim;" and, therefore, the people's

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interest in, and right to claim the demand sued for, or sought to be recovered, must appear by some appropriate averment in the pleadings to enable him to maintain the action. Does it so appear from any thing contained in the declaration before us, that the State has any interest in, or right to claim the demand exhibited in this action? In our opinion it does not. The action appears, by the record, to be founded on the official bond of Taylor, as Sheriff of the county of Pulaski, executed by him, and his securities, to John Pope, Governor of the Territory of Arkansas, and his successors in office, and the demand claimed by the Auditor, for the use and benefit of the State, is the penalty of said bond, a copy of which, together with the condition thereunder written, appears to have been given as oyer, and filed as part of the record of this case, which was accepted as oyer by the plaintiffs in error, who thereupon filed their demurrer to the declaration. The only additional averments in the declaration, material to be noticed, are, that the plaintiff is the Auditor of Public Accounts of the State of Arkansas, duly elected, commissioned, and qualified, as the law prescribes; that he, in his official character as Auditor of Public Accounts for the State of Arkansas, sues for the use and benefit of the State, and that by virtue of the statute, in such case made and provided, an action hath accrued to him as Auditor aforesaid, "to have, demand of, and sue the said defendants, for the use and benefit of the State of Arkansas, for the sum of fifteen thousand dollars above demanded." Do these facts, in themselves, in any form in which they can be presented, admitting them all to be true, establish any legal right in the people of the State, to claim the debt demanded by the Auditor for the use of the State? Certainly they do not; for the obligation of the defendants set out in the declaration, is not to the State, nor is the State alone beneficially interested in it; the right to sue upon it, it is true may accrue to the State in like manner as to individuals, and when this action was commenced, the Auditor, if he had elected to do so, was at liberty to cause suit thereon to be prosecuted in the name of the Governor, for the use of the State, precisely as individuals could do for their own use; but the statute authorizing suits to be prosecuted in the name of the Auditor of Public Accounts for the State of Arkansas, "for such demands as the people of the

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State have a right to claim," is in derogation of the common law, and only gives the right to sue in the name of the Auditor in cases where the State has a legal right to the subject matter of the demand; and, therefore, upon every principle of law, such right must appear on the face of the pleading, otherwise the case cannot be considered as within the statute, and the omission will be fatal on demurrer, in arrest of judgment, or on error, because it omits to state any title or cause of action at all in the State, and cannot therefore be regarded as a title defectively stated, and therefore, as no legal liability on the part of the defendant below to pay the money to the State, which the Auditor claims of them for the use of the State, is shown in the declaration, the demurrer thereto was for this reason well interposed, and ought to have been sustained whether the defect was specially stated in the demurrer or not.

The second matter specially stated in the demurrer as a ground of demurrer, is within the principle decided by this court, in the case before mentioned, of Conway, Auditor, &c., *vs.* Woodruff, *et als.*, where it was held that the failure of the officer to obtain the approval of his official bond, as required by the statute, does not in any manner affect the liability of the officer and his securities in such bond, if it is in every thing else legally executed and by them delivered as their obligation, and therefore the omission to set forth such approval in the declaration is not a defect available upon a general demurrer.

The third objection asserts that there is a material variance between the obligation given on oyer and that described in the declaration, but fails to point out the particular variance, and no such variance as would be fatal to the declaration on general demurrer is perceived by the court.

The fourth objection rests upon the assumption that Benjamin Williams, who is alleged to be a co-obligor, and not sued with the defendants below ought to have been joined in the suit, and this, if the additional fact that he is still alive appeared in the declaration, would, by the common law, be a good ground of general demurrer, and perhaps it may be a valid objection to the present declaration, as it is not stated therein that the obligors or makers of the bond sued on reside in different counties, so as to bring the case within the provisions of

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the statute, passed 10th January, 1816, and in force here when this action was commenced, *Ark. Dig.* 312, which declares that "in all cases hereafter where the obligor or obligors, maker or makers, of any note, bill, bond, or other contract, reside in different counties, it shall be lawful for the plaintiff, or plaintiffs, to institute suit against all, or as many of them as he may think proper, and it shall be lawful for the Clerk of the court, in which such suit shall be instituted to make out a separate summons, or *capias*, as the case may be, against the person or persons residing in a different county directed to the Sheriff of the county, or counties, where such person or persons reside, and endorse on such writ, that it is a counterpart of the writ issued, where such suit is commenced." These statutory provisions innovate upon, and change the common law, so far as to authorize the suit to be brought and maintained against any number of the obligors or makers of the contract, but upon every principle of law, the plaintiff to avail himself of this special privilege, and present his case within the operation of this statute, so as to exclude it from the operation of the general rule, must show by some proper averment on the face of his declaration, that the obligors, or makers of the contract, reside in different counties. The objection, however, as to the non-joinder of parties who ought to be joined in the action was not available on demurrer, even at common law, unless it appeared by the declaration or other pleading of the plaintiff, that the parties not sued, not only executed the contract, but also that they are still alive, and if this does not appear, the objection can only be taken advantage of by plea in abatement, and to this effect are the cases of *Rice vs. Shute*, 5 *Burr Rep.*, 2611; *Cabell vs. Vaughn*, *Rep.*, 291, n. 4; also *Gilman vs. Rives*, 10 *Peter's Rep.* 298.

In the case before us the declaration does not positively show that the co-obligor Williams was alive when the action was commenced, but it is simply stated that he executed the bond, and is not sued. This language strongly implies that he was living, but whatever the legal presumption from it may be, it is deemed unnecessary to decide, as the demurrer ought to have been sustained on the ground before stated, and if the case is remanded, the plaintiff will be at liberty to amend his declaration, and may obviate this objection, unless it may be

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taken advantage of by plea in abatement at that stage of the pleading in the Circuit Court.

The matter of the fifth, sixth and seventh objections, specially stated in the demurrer, are not defects of which the defendants can avail themselves by general demurrer at common law, because if the debt demanded had been paid to Governor Pope, or either of his successors in office, by the obligor Williams, such payment, if legally made, would enure to the benefit of all his co-obligors, and the defendants could avail themselves by an appropriate plea of payment, and the breach assigned expressly negatives the payment by the defendants, or either of them, of the sum demanded, or any part thereof, to Gov. Pope, or either of his successors in office, or to the Auditor, since the right of action accrued to him by virtue of the statute before cited; and no special demand of payment was necessary to be averred as the sum demanded was legally due and payable according to the terms of the contract described, at the date of the bond, and it must in our opinion, be admitted that if there is no necessity to mention the co-obligors not sued in the declaration at all, *a fortiori* any allegation that they have not paid the debt must be unnecessary, and this appears clearly from the cases above cited to be the settled rule of the common law, for in some of them it is expressly stated that the deed or obligation set out on oyer, purported to have been sealed by persons not sued, and yet the objection was not deemed good on demurrer, because it did not appear that the person not sued had sealed the obligation and was still living; which, in every case must appear to entitle the defendant to avail himself of this objection, and, therefore, a plea in abatement, setting forth the facts, was necessary when they did not appear on the face of the plaintiffs pleading, and which, in our opinion, is yet the rule of law, applicable to such cases, and as there is no averment in the declaration that Lowery, who is alleged to be dead, ever executed the bond, the rule in every respect applies to the case before us, and overrules the three last mentioned grounds of demurrer.

Having now disposed of the demurrer, and the several matters contained therein, specially stated as defects in the declaration, it is deemed unnecessary to notice particularly any other of the numerous

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matters which have been assigned as error in the proceedings and judgment of the Circuit Court, as the same questions may not arise upon another trial of the cause. It is, however, considered proper to state that the law in force, when the bond mentioned in the declaration bears date, requiring the Sheriff to give such bond to the Governor and his successors in office, does not vest in him or his successors in office, any beneficial interest whatever in the contract. He takes simply the legal interest, in his corporate character, as the legal and legitimate representative of the sovereignty of the people, and holds it as a naked trust for the use and benefit of any person, corporation, or body politic and corporate, who, or which may be damnified by any violation or breach of any stipulation contained in the condition thereof, and every person, corporation, or body politic and corporate, so damnified, is authorized by law to sue upon the bond, in the name of the Governor, for his or their use, from time to time, as often as may be necessary, until the whole penalty of the bond shall be satisfied or recovered. From which it appears that the Governor, and his successors in office, are vested by law simply with the legal interest in the obligation, without any authority to receive or release the debt, or in any manner change or discharge the obligation, otherwise than for the use of those who may sue and recover thereon for some breach of the condition thereof. And it will be observed also that the law has not conferred upon the Auditor any legal right to receive payment or satisfaction of any demand which the State or people have a right to claim; the power to sue and recover is alone vested in him by the provisions of the statute above cited, and therefore he cannot discharge the legal liability of any person to the State, or people of the State, except in the manner prescribed by law, after payment or satisfaction of the demand has been made to such officer as is authorized to receive it for and on account of the State, and, therefore, to enable him to maintain any action in his name, as Auditor of Public Accounts for the State, he is bound to exhibit such facts as "create a legal demand in favor of the State" against the defendants, and if the action be founded, as it is in this case, upon the official bond of a Sheriff, it must be shown that the demand claimed for the use of the State, has accrued by reason of some act

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done, or omitted, by the Sheriff in the discharge of his official duties, in violation of some stipulation contained in the bond, with sufficient averments that payment or satisfaction of such demand has not been made to such person as is authorized by law to receive it, for, or on behalf of the State, and here it may not be improper to remark that in this, as well as in some other respects, the suggestion of breaches in the present case, as contained in the transcript of the record before us, is materially defective; and as the case must be remanded to the Circuit Court for further proceedings to be there had, we feel it our duty to state that, in our opinion, this suit may well be prosecuted to a final judgment on the merits of the controversy, in the name of the Auditor of Public Accounts for the State of Arkansas. It having been commenced before the statute authorizing him to sue was repealed, his right to prosecute it to a final adjudication on the merits is preserved by the provisions contained in the 29th and 31st sections of chapter 129 of the Revised Statutes of Arkansas, pages 698 and 699. The former provides that "the repeal of any statutory provision by this act, shall not effect any act done, or right accrued, or established, or any proceedings, suit, or prosecution had or commenced in any civil case, previous to the time when such appeal shall take effect; but every such act, right, and proceeding, shall remain as valid and effectual as if the provisions so repealed had remained in force;" and the latter declares that "no action, plea, prosecution, or proceeding, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provision had not been repealed, except that all proceedings had, after the taking effect of the Revised Statutes, shall be conducted according to the provisions of such statutes, and shall be, in all respects, subject to the provisions thereof, so far as they are applicable." These provisions were designed to protect the parties to all proceedings pending for adjudication in any of the courts of this State at the period of the taking effect of the Revised Statutes, in all their rights as they then existed; so that the adjudication upon any proceeding or pleading had prior to that time, in any case then pending, shall be governed and determined by the law in force when the proceeding took place, without reference to any

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subsequent change made therein in regard to the same, or the like proceeding, by any of the Revised Statutes, requiring however, at the same time, all proceedings subsequent to the taking effect of the statutes, even in cases previously commenced and then pending, to conform to the provisions thereby made, so far as they are applicable; but they cannot, consistently with the spirit and intention of the law, be considered as applicable when their application would avoid or invalidate any proceeding previously had in a matter then pending, which was before valid and authorized by the law in force, applicable to it when it accrued, and the same rules apply *e converse*, as that no proceeding not previously authorized, or legally invalid, when it accrued, is aided thereby; and, therefore, as this suit was, in this respect, properly commenced, it can be legally prosecuted to a final adjudication in the name of the Auditor, notwithstanding the statutory provision authorizing it, is so far repealed, as to divest the Auditor of his right to commence suit in his own name and official character for any demand claimed by the State since the Revised Statutes went into operation.

Wherefore, it is the opinion of this court, that there is error in the judgment of the Circuit Court, of the county of Pulaski, given in this case, for which the same ought to be, and is hereby, reversed, annulled, and set aside, with costs, and the cause remanded to the said Circuit Court, with instructions to said court to sustain the demurrer to the declaration, and grant the plaintiff leave to amend, if he shall apply therefor, and for further proceedings therein to be had, according to law, and not inconsistent with this opinion.

BALL *against* KUYKENDALL.

ERROR to the Crawford Circuit Court.

When the Legislature authorized an appeal from the decision before a Justice of the Peace, they intended merely to give to the party appealing, an opportunity of again bringing before another court and jury the matter in controversy, and to have the same again tried and determined on its merits.

The defendant before a Justice, by appealing, precludes himself from taking advantage of any irregularity in the proceedings before the Justice; and must rely alone on his defence to the merits.

He cannot, therefore, in the Circuit Court, plead in abatement the misnomer of the plaintiff.

This was an action originally instituted before a Justice of the Peace, and founded on a writing obligatory. The process was served on Kuykendall alone, against whom judgment was entered by default, and from which he took an appeal to the September term of the Circuit Court. At which time, as is stated by the record, he filed a plea in abatement, alleging that the plaintiff, who had sued by name of B. B. Ball, "was, when the suit was commenced, called and known by the name of Bennett B. Ball, and not B. B. Ball." The plaintiff in error moved to strike out this plea, but was overruled by the court. The plea was sustained, the suit ordered to be abated, and judgment was thereupon entered in favor of the defendant for the costs.

TURNER, for plaintiff in error:

It is conceived that the court below erred in overruling the motion to strike out said plea in abatement, and in giving judgment for the defendant, because the said defendant, Kuykendall, by appealing to the Circuit Court of Crawford county, made himself a party to the proceedings, and was bound to rest on such defence as he might lawfully have made to the merits of the action, and could not avail himself of any errors or defects in the Justice's writ or service thereof. *Smith vs. Stinnett*, 1 Ark. Rep. p. 497; *Pinxley vs. Winchell*, 7 Cow, page 366.

The statute is express and imperative in requiring that appeals from the decisions of Justices of the Peace shall be tried by the Circuit Courts anew, and upon their *merits*, without regard to any error, defect, or other imperfection in the proceedings of the Justice. But the plea in *abatement* was not a plea to the merits of the action, and was therefore impertinent and inadmissible.

The statute gives the parties a trial *de novo* upon the merits of the action. Its object was to discourage frivolous and technical objections to proceedings had before Justices of the Peace, which but too often defeated the ends of justice, produced delay, and entailed much expense upon litigants.

If the plea in abatement was at all admissible in this case, it should have been pleaded in the Justices Court. After the *appearance* of the defendant it was too late to avail himself of such defence. See Revised Statutes, p. 516, Title Justices of the Peace, sec. 177.

DICKINSON, *Judge*, delivered the opinion of the court:

That the defendant had a right to appeal and was regularly in the in the Circuit Court is not controverted. The *Rev. Ark. Stat.*, sec. 172, p. 515, declares "that no appeal shall be allowed unless the applicant, or some other person for him, shall make and file with the Justice an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done, and section 176 requires the court to "hear, try, and determine the same anew, on its merits, without regard to any error, defect, or other imperfection in the proceedings of the Justice."

All pleas in abatement (unless to the jurisdiction of the court, or where the truth of such plea appears of record) must be sworn to before they can be admitted or received by any court in this State. See *Rev. Ark. Stat.* p. 57, sec. 1. Whether the plea, in this instance, conformed to the statute or not, this court cannot determine, as it is not spread out.

We cannot however discover upon what ground the defendant in error could base an argument in support of such a defence as he has put in; for it is evident that the Legislature when they authorized a party to appeal from the decision of a Justice of the Peace, intended

merely to give him an opportunity of again bringing before another court and jury the matter in controversy, and to have the same again tried and determined upon its merits, and this is made more manifest from the affidavit required, that "the appeal is not taken for the purpose of delay, but that justice may be done." In this instance, he interposes a plea which has no relation to the merits of the cause, but calculated alone to delay its final termination—a plea which goes not to the cause of action, but questions the propriety of the suit, or the mode of bringing it, leaving the merits or rights of action wholly undetermined. Such pleas are considered odious to the law, or at least not favored. It is clear to us that the defendant, by his appeal, has precluded himself from taking advantage of any irregularity in the proceedings before the Justice, and must rely alone upon such defence as he may have to the cause of action upon which the suit is founded. The same principle was established in the case of *McKee vs. Murphy*, 1 *Ark. Rep.* p. 55; and *Smith vs. Stinnett*, *ib.*, 497; and is considered too well established to require further argument.

The judgment of the Circuit Court in sustaining the plea in abatement must therefore be reversed and set aside with costs, and this case remanded to the court from whence it came, for further proceedings to be had therein not inconsistent with this opinion.

SMALL *against* STRONG.

APPEAL from Phillips Circuit Court.

There is a broad and marked distinction between the *nature* of the defence in law which a party may have, and the form and manner of legally interposing such defence.

The statute of assignments of 1807, and the proviso thereto, was designed to preserve to the defendant, as the obligor, or maker of the contract, the full benefit of every legal defence against the instrument assigned, but not to dispense with any law regulating and prescribing the time, manner, or form, of availing himself of it.

The proviso creates no new plea, nor does it define what shall constitute for the defendant a defence at law, but simply preserves to him such defence at law as he may have against the original assignor; and leaves him to make it out in such manner, or by such pleadings as, according to common law or statute, may be interposed as a legal defence to the action in the form in which it is prosecuted.

And further, the statute secures to the assignee a legal right to recover whatever is due on the contract when the assignment is made.

This is a statute of Louisiana, passed where the civil law existed and furnished the rule of decision, as well in regard to the right as the remedy; and it must be understood as referring to that code in all its provisions.

By that code, whenever there exists between private persons a mutual indebtedness, on account of money due, the law so operates upon the debts, as to make them destroy or extinguish each other, from the period of their mutual or reciprocal existence, which happens by the simple operation of law, and without any other act of the parties.

The statute therefore was designed to define, limit, and protect the rights of the assignee, acquired by the assignment; which are, to sue in his own name on the assigned contract, in the same manner as the payee might have done, if no assignment had been made; and to recover the sum really due at the time of the assignment.

The *proviso* was inserted as declaratory of a right then subsisting in the defendant, which it was not intended to impair or subvert. Therefore, if the assignor was indebted to the defendant before and at the time of assignment, the law extinguished so much of the defendant's debt, as the debt of the assignor to him amounted to; and the residue constituted the amount which the assignor could transfer.

That the assignor was indebted to the defendant in a certain amount at the time of assignment, was therefore a legal defence against so much of the assigned contract, in the hands of the assignee; and it was defences of this and the like kind which were preserved by the statute.

But instead of preserving the civil law, as it existed in Louisiana when this statute was passed, the Legislature retained the statute, without any modifications of its provisions, while they have entirely discarded the civil law, and adopted in its stead the common law, and statutes of England previous to 4 James 1.

The common law, and these statutes, do not recognize the principles of compensation and extinguishment of debts by mere operation of law as does the civil law; but establish the rule that it is no defence to an action, that the plaintiff is indebted to the defendant as much, or more, than the defendant is indebted to him; and leave the defendant to his remedy by another action; unless the nature of the employment, transactions or dealings are such as necessarily constitute an account, consisting of receipts and payments, debts and credits; and the *balance* only is considered as the debt.

No statute of England, working any change in this respect, has been in force in this State: and the right of set off here derives its being from the statute of 1818.

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That statute only intended to admit this defence, when the demand sued for, and that to be set off, are *debts* mutually subsisting between the plaintiff and defendant. Therefore in a suit by an assignee under our statutes, a plea that the assignor had executed a different note, which had been assigned to the defendant, before the assignment of the note sued on, sets up no legal defence; nor does the demand stated in the plea operate an extinguishment of any part of the debt sued for.

Strong, as assignee of Salathiel Knight and James Bell, late merchants, trading under the firm of Knight and Bell, commenced an action of debt, on a writing obligatory, made by Small, bearing date the 7th day of October, A. D., 1837, for the sum of \$603 97 cents, payable to the said Knight and Bell on or before the 1st day of January, A. D., 1838, which he avers was regularly endorsed, signed, and made over, and delivered to him, by the said Knight and Bell, on the 15th day of October, A. D., 1837, and before the payment of the sum of money therein specified, or any part thereof, whereby, and by force of the statute in such case made and provided, an action accrued to him to demand and have of said Small the said sum of money therein specified according to the tenor and effect of said writing obligatory; the breach is in the usual form, negating any payment to Knight and Bell before, or to Strong after, the assignment. The case was returnable to the June term of the Circuit Court of Phillips county, A. D., 1838, at which term Small appeared, and without praying oyer of the writing sued on, or the assignment thereof, filed his plea of set off in bar, setting forth, in substance, that before the commencement of the suit, and before the assignment of said writing obligatory to the plaintiff, to wit, on the 8th day of October, A. D. 1837, the said Knight and Bell, the assignors of the writing sued on, executed their certain writing obligatory, by their abbreviated name, style, and description of Knight and Bell by which they bound themselves to pay the sum of \$110, on or before the first day of January, A. D., 1838, to John Harrison, or order, and that said Harrison, afterwards, and before the assignment of the said writing, sued on to wit, on the 10th day of October, A. D., 1837, by endorsement thereon, assigned the said writing obligatory of the said Knight and Bell to the said defendants, of which the plaintiff had notice, and so the said defendant says that the said Knight and Bell are indebted to him in the sum of \$110, with interest thereon since the first day of January, A. D., 1838, and no more, the whole of which, as

he alleges, is due and unpaid, and he offers to set off the same against so much of the debt mentioned in the declaration and avers that he has a right to do so by force of the statute in such case made and provided, and, after praying judgment as to so much of the plaintiff's debt, concludes with a verification. To this plea the plaintiff demurred, and the defendant joined in the demurrer, upon argument whereof, the court adjudged the plea insufficient, and sustained the demurrer thereto, and then proceeded to give judgment against the defendant for the full amount of the debt mentioned in the declaration, with interest thereon, and costs of suit, from which the defendant appealed.

McPHERSON, for the appellant:

The law of assignments in force, when this suit was commenced, provides "that nothing in said law shall be so construed as to change the nature of the defence in law, that any defendant may have against the assignee or the original assignor. See *Steele's Dig.* p. 75.

By reference to the Kentucky law of assignments, *Brown and Morehead's Dig.*, vol. 1, p. 150, it will be seen that our law is almost an exact copy of the law of Kentucky, omitting the *notice of assignment* required in Kentucky; hence the rule of construction applied in Kentucky may well be adopted here, at least, where it does not turn upon "notice of assignment," and although it would seem but justice that the courts should require the *notice* of the assignments to be given, and thus supply the defect in the law, which, if construed otherwise, would tend in many instances to work manifest injury to parties. It is of no importance in the present case what construction is given, for the *set off* claimed in this cause was in existence before the assignment to Strong. Could the defendant below have plead as a set off the note assigned by Harrison against Knight and Bell? If he could, and of this there can be no question, by our statute he could do so at the suit of the assignee, and in support of which I rely upon the cases of *Harrison vs. Burgess*, 5 *Monroe*, p. 417; *Bowman vs. Halstead*, 2 *Marshall* 200; *Hardin* 21, 1 *Monroe* 195; *Childs vs. Corn*, 3 *Marshall*, 230; *Litt. selected cases*, 471; *Schooling vs. McGee*, 1 *Monroe*, 233; which authority is deemed sufficient, and as being directly applicable to the position assumed by the appellant.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The judgment of the Circuit Court, pronounced upon the demurrer to the plea, is the only question raised by the assignment of errors, or presented by the record. To support his plea, the appellant relies mainly upon the statute on the subject of assignments; *Territorial Dig.* 74, which enacts that "all bonds, bills, and promissory notes, for money or property, shall be assignable, and the assignor may sue for them in the same manner as the original holder thereof could do; and it shall and may be lawful for the person to whom the said bonds, bills, or notes, are assigned, made over, and endorsed, in his own name to commence and prosecute his action at law for the recovery of the money mentioned in such bonds, bills, or notes, or so much thereof as shall appear to be due at the time of such assignment, in the like manner as the person to whom the same was made payable, might or could have done; and it shall not be in the power of the assignor, after assignment made as aforesaid, to release any part of the debt, or sum, really due, by the same bonds, bills, or notes; *Provided*, that nothing in this section shall be so construed as to change the nature of the defence in law, that any defendant may have against the assignee, or the original assignor." He also relies upon the adjudication in Kentucky, upon a statute containing provisions in some respects similar to those above quoted; but none of the cases cited in his brief, are analogous to the one now under consideration, being either cases in equity, under the provisions in their statute, which declare "that the defendant shall be allowed all discounts, under the rules and regulations prescribed by law, he can prove at the trial, either against the plaintiff or the *original obligee or payee*, before notice of the assignment; *And provided always*, that nothing in this act contained, shall be so construed as to change the nature of the defence, either at law or equity, that any defendant, or defendants, may have against an assignee or assignees, or the original assignor or assignors," *Ky. Dig. by Morehead and Brown*, vol. 1, p. 151, and involving some equitable ground of claim or defence; or cases at law where the defence rested upon some matter indissolubly attached to or springing out of the contract sued on, before the obligor or maker

had notice of the assignment, which is expressly given, or reserved to the defendant by the provisions above quoted from their statute. But in the case of *Triplet vs. Bradley*, 6 *Monroe*, 354, the Court of Appeals, of Kentucky, held that a note of the assignor, assigned to the defendant, and held by him at, and before the transfer of the note sued on, by such assignor to the plaintiff, was well pleaded as a set off against the plaintiff suing thereon as assignee. Chief Justice Bibb, delivering the opinion of the Court, in this case, uses this emphatic language: "The idea, entertained by the plaintiff's counsel, that a note assigned to the defendant, upon Dunham, whilst Dunham was the assignee of the note sued on, and before he assigned it to the plaintiff is incorrect; the bare reading of the statute of assignment shows the contrary." The same point was expressly adjudged by the Supreme Court of the United States, in the case of *Stewart vs. Anderson*, 6 *Cranch*, 203, on the statute of Virginia, between which, and the Kentucky statute of assignments, above cited, there is no essential difference. Indeed, the latter appears to have been almost literally transcribed from the former; and if our statute of assignments made the same provisions in favor of the defendant, and directed as they do, the allowance of "all discounts which he could prove at the trial," either against the plaintiff or the original obligee, or payee, we might, and probably would be disposed to give to it the construction given to those of Kentucky and Virginia, in the cases above cited, and admit the plea of set off of a demand held by the defendant against the payee or assignor when the assignment was made; for as the demand, so held, is expressly made a legal defence to the action, the party could avail himself of it, by way of set off, whenever the facts were within the purview and operation of the statutes authorizing the defence in that form. But our statute of assignments is silent on the subject of discounts, providing simply that the nature of the defence in law, that any defendant may have against the assignee, or the original assignor, shall not be changed thereby; and in this respect it differs from the statutes of Kentucky and Virginia, which expressly make every matter of discount against the assignor, as well as the plaintiff, a legal defence to the action: therefore, to understand the effect and operation of the pro-

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viso to our statute, upon the respective rights of the parties, and ascertain what defence may be legally made, in an action at law by the assignee against the obligor or maker, upon a contract assigned under and by virtue of the provisions of the statute, it is proper to consider, first, whether the matter of the plea constitutes in law a valid defence to the action; secondly, whether the plea may be legally interposed to the action; and thirdly, whether it is legally sufficient in point of form; for it must be conceded that a plea, legally defective in either respect, could not be admitted as a defence in law to the action. And here it may be proper to observe that there is, in our opinion, a broad and marked legal distinction between the nature of the defence in law, which a party may have, and the form and manner of legally interposing such defence. But, to make his defence available, the matter thereof must be sufficient, and must be interposed in the legal form. Thus, in some of the forms of action established by the common law, which is adopted by our statute, and made to comprise a part of the system of laws in force here, the defendant commonly pleads the facts or matter of his defence specially, while in others he is at liberty to plead the matter specially, or to plead the general issue, and avail himself of the same matters of defence by adducing the facts thereof as testimony on the trial, as he may elect; but the nature of the defence, or, in other language, the facts constituting a legal defence to the action, are not so much subject to his election or control; as for instance, any intrinsic legal objection to the contract, as that it was obtained by fraud, or duress, or founded on some illegal, insufficient, or vicious consideration, and the like; or to its present existence as an obligation, debt, or duty; as that it has been paid, released, or otherwise legally discharged, and the like, because, such defences, from the moment of their existence, become absolutely and inseparably attached to, and follow the contract, whether it remains in the hands of the obligee or payee, or passes into the hands of some assignee, under the provisions of the statute; and the proviso under consideration, was, as we apprehend, designed to preserve to to the defendant, as the obligor, or maker, of the contract, the full benefit of the latter, but not to dispense with any law regulating and

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prescribing the time, manner, or form, of availing himself of it, and, therefore, the defence must be made, or pleaded, in due time, and in proper order, in some form legally admissible, in the particular form of action to which it is opposed. It will be remarked, also, that the proviso under consideration does not create any new plea, or define what shall constitute, for the defendant, a defence at law, but simply preserves to him such defence at law as he may have against the original assignor, or the assignee, and leaves him to make out his defence in such manner, or by such pleadings, as, according to common law and statutes in force at the time, may be interposed as a legal defence to the action, in the form in which it is prosecuted; while, on the other hand, the statute professes to secure to the assignee a legal right to recover whatever may appear to be due on the contract when the assignment is made, and thereby prohibits the assignor from releasing any part of the debt or sum really due on the obligation or note after the assignment is made. It will also be recollected that this statute of assignments was passed by the legislative authority of the Territory of Louisiana, where the civil law existed and furnished the rule of decision, as well in regard to the right, as the remedy, and it must therefore be understood as referring to that code, in all its provisions according to the principles of which, whenever there exists between private persons a mutual indebtedness, on account of money due, the law so operates upon the debts as to make them destroy or extinguish each other from the period of their mutual or reciprocal existence, which happens by the simple operation of law, and without any other acts of the parties. 1 *Pothier on Obligations*, Evans' Ed., 366, 374. This statute, therefore, appears to us to have been designed to define, limit, and protect, the rights of the assignee acquired by virtue of the assignment, and the proviso thereto to have been inserted as declaratory of a right, then subsisting in the defendant; which it was not the intention of the law to impair, or in any manner subvert. The rights of the assignee as derived through the assignment, by virtue of the statute, are first, the right to prosecute an action at law in his own name, for the recovery of the money, mentioned in the contract, assigned in like manner as the payee thereof might or could have done

if no assignment had been made; and, secondly, to recover the sum really due on the contract at the time of the assignment; and to secure to him the latter, the assignor, after assignment made, is expressly prohibited by law from releasing any part of the debt, or sum, really due by the contract; but if the assignor was indebted to the defendant prior to and at the time when he assigned the debt of the defendant, the law extinguished so much of the debt of the latter as his debt against the assignor amounted to, and the residue only constituted the debt or sum really subsisting, which the assignor could transfer, and which the assignor was authorized by the statute to sue for and recover in his own name, and the assignor could not, after the assignment, release; therefore, the existence of such debt, in favor of the defendant against the assignor, as it destroyed and extinguished so much of his debt, or legal liability, to the assignor, and reduced the extent of his legal liability on the contract to the residue unextinguished and really subsisting when the assignment was made, constituted in favor of the defendant a legal defence as to so much of the debt as had been thus compensated and extinguished, in the hands of the assignee, as well as the assignor; and he could avail himself of it in the action brought upon the contract by the assignee; and such defence was under the civil law indispensable to prevent a positive injustice to the defendant, as he had no means of obtaining any satisfaction of his already extinguished debt against the assignor, except by opposing it as a compensation against so much of the assigned debt, as was in like manner extinguished by it; and it was defences of this, and the like kind, which it was the design of the proviso to preserve, by requiring the statute to be so construed, that the defendant should not be prejudiced by the assignment, but should have the same benefit of them as a defence at law against the assignee, as he was by law previously entitled to against the original assignor, or in other words, the legal rights of the defendant, in regard to the contract assigned, should not be impaired in consequence of the assignment. But instead of preserving the civil law, as it existed in Louisiana when this statute was passed, the legislative authority have thought proper to retain the statute without any qualification of its provisions, while they have dis-

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carded the civil law as a system of jurisprudence, and introduced in its stead, the common law of England, which is of a general nature, and all statutes of the British Parliament, in aid of, or to supply the defects, of the common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, and declared that the same, when not contrary to the constitution and laws of the United States, or of this State, "shall be the rule of decision" in the State. The common law and statutes so introduced, do not recognize the principles of compensation, and extinguishment of debts, by the mere operation of law, as established and maintained by the civil law; but decide that it is no defence to an action at law, that the plaintiff is indebted to the defendant in as much, or more, than the defendant is indebted to him; and leave the defendant to his remedy, by another action at law to recover his debt against the plaintiff, unless the nature of the employment, transactions, or dealings, necessarily constitute an account consisting of receipts and payments, debts and credits, and then the balance only is considered the debt, and nothing more can be recovered. These principles are well established, and clearly defined, by the common law, and no statute of the British parliament, effecting any change in them, has been in force here. The law of set off is no part of the common law, and its origin in England can be traced no farther back than 4 Anne and 5 George II, which provided for a set off of mutual demands in the case of bankrupts only; but this right has been greatly extended by the statutes of the 2 and 8 George II, and now forms an important part of the jurisprudence of that country. These statutes, however, were never in force in this State, and the right of set off, as a legal defence to an action at law, as it exists in our jurisprudence, derives its being from the statute approved December 23, 1818, section 107, Arkansas Digest, by Steele and McCampbell, 352 and 353, which provides that "if two or more persons be mutually indebted to each other, by judgments, bills, bonds, bargains, promises, accounts, or the like, and one of them commence an action, in any court, one debt may be set off against the other, notwithstanding such debts may be deemed, in law, of a different nature, and such matter may be given in evidence

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upon the general issue, or pleaded in bar, as the nature of the case may require, so as at the time of pleading the general issue, when any such debt is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due or otherwise, such matter shall not be given in evidence on such general issue, and if it shall appear by an adjustment of said mutual demands, that the plaintiff has been overpaid, the jury shall find the amount thereof in their verdict, and judgment shall be entered up by the court for the defendant against the plaintiff for the amount by said verdict found due to the defendant, with costs."

It is clear, from the phraseology of this statute, that the Legislature only intended to admit this defence when the demand sued for, and that to be set off, are debts mutually subsisting between the plaintiff and defendant, and if there could otherwise be any doubt upon this subject, it must, we think, be entirely removed by the latter provision, which expressly requires the court to enter up judgment for the defendant against the plaintiff, where it appears upon an adjustment of said mutual demands that the plaintiff has been overpaid, for such debt or sum so found due to the defendant, which could only be done where the demand sued for, and that set off against it, mutually subsist between the plaintiff and defendant, and it would be contrary to law, as well as to reason and justice, to decide upon the rights of persons who are not parties to the proceeding, more especially such rights as are, in no respect, necessarily connected with the subject matter of the action, and to which the plaintiff is a stranger. The plea does not, therefore, in our opinion, present such facts as constitute a valid defence in law to the action, because the demand described in the plea, could not, under our laws, so operate as to extinguish so much of the debt of Small to Knight and Bell, notwithstanding the mutuality of their indebtedness at one period of time, nor could it have operated as a compensation under the civil law, because the mutuality of the indebtedness was destroyed by the assignment of Small's debt to Strong by Knight and Bell, before either debt became due, and it cannot be placed as a

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set off to the action of Strong, because there is no mutual indebtedness subsisting between him and Small, shown by the plea; wherefore, it is the opinion of this Court, that the plea of the defendant below does not show a defence in law to the action, and is no legal bar to any part thereof, and that the demurrer of the plaintiff thereto was rightly sustained, and, therefore, there is no error in the proceedings and judgment of the Circuit Court of Phillips county, given in this case, and the same ought to be, and it is hereby, in all things affirmed with costs.

POPE *against* TUNSTALL and WARING.

ERROR to Pulaski Circuit Court.

The doctrine that one bond accepted in lieu of another is no satisfaction, holds only where there is a simple exchange of bonds. There must be some difference between the former and latter contract, to show that the parties intended to alter it, by substituting something more advantageous to the creditor than he before possessed, as by shortening the time, giving other security, or the like.

To a bond, accord and satisfaction by deed alone can be pleaded.

Accord *executed* is satisfaction—accord *executory* is not—and an accord must be completely executed, in all its parts, before it can produce any legal obligation or effect.

A plea, simply alleging acceptance of a smaller sum of money, in satisfaction of a larger, is bad : but if it alleges the payment of a less sum before the day of payment stipulated in the contract, or at a different place ; or the delivery of a specific article in satisfaction, and acceptance thereof in satisfaction, it is good : so a plea alleging payment of a less sum by a third person, and acceptance in satisfaction.

An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action.

If a debtor give his note, endorsed by a third person, as further security for part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt ; and may be pleaded in bar as an accord and satisfaction.

An express agreement by a creditor, to take a bill or note for the full amount of his debt, as an absolute payment or extinguishment thereof, destroys the right of action on the original contract.

In debt on bond, a plea avering that before suit brought, the obligees in the bond had taken a third person into partnership ; that before suit the defendant, with two securities, executed to the new partnership a new bond, on longer time, which was accepted and received in full satisfaction and discharge of the bond sued on ; these facts being aptly pleaded ; is a good plea in bar of accord and satisfaction.

Shortening the time of payment alone, is not the only case in which a plea of this kind would be good. Any change, or alteration, which renders the creditor's situation more advantageous, or the debt more secure, will suffice.

This was an action of debt, instituted by defendants in error, as partners under the name, style, and firm of *Tunstall and Waring against W. F. Pope and James W. Dunahay*, upon a writing obligation bearing date 19th of May, 1838, for \$1,109 35.

Pope pleaded *nil debet*, and a second plea of accord and satisfaction, in which he alleged that “after the execution and delivery of the certain writing obligatory of the said Dunahay and the said Pope, to the said Tunstall and Waring, in the declaration of the said plaintiff mentioned, on the 25th day of January, 1839, at the county of Pulaski, aforesaid, the said James M. Tunstall, and the said George Waring, co-partners as aforesaid, entered into co-partnership with one

2	209
70	220
2	209
75	263
2	209
78	306

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Robert S. Carter, and then and there admitted and received the said Robert S. Carter into co-partnership with them, the said Tunstall and Waring, as well in the matter of the said writing obligatory, as in trade or merchandize, and the said Tunstall, and Waring, and Carter, then and there did, and carried on, and at until the present time, have carried on and done business, as merchants, in company, by and under their co-partnership name, firm, and style, of Tunstall, Waring, and Co., and the said Pope, in fact, further saith, that after the forming and entering into said last mentioned co-partnership, and before the institution of this suit, to wit: on the said 25th day of January, A. D. 1839, at the county of Pulaski aforesaid, the said Pope, by the name, style, and description, of Wm. F. Pope and Alexander V. Brookie, by the name, style, and description, of A. V. Brookie and Nicholas Peay, by the name, style, and description, of N. Peay, made and sealed their several joint and several writing obligatory, bearing date the day and year last aforesaid, in the words, letters, and figures, following, to wit: "On or before the first day of January, (1843,) one thousand eight hundred and forty-three, we jointly and severally promises to pay James M. Tunstall, George Waring, and R. S. Carter, trading and doing business under the name, style, and firm, of Tunstall, Waring, & Co., or order, one thousand one hundred and eighty-six dollars and eighty-five cents, for value received, drawing interest at the rate of nine per cent. per annum from date until paid. Nevertheless, it is understood, that I am privileged to pay one-fourth of the above amount on the first day of each year, with the interest thereon, until the whole is completely liquidated, both principal and interest. Given under our hands and seals this 25th day of January, 1839.

WM. F. POPE, [L. s.]

A. V. BROOKIE, [L. s.]

N. PEAY, [L. s.]"

And then, and thereby meant to promise, and promised, jointly, and severally, to pay the said James M. Tunstall, and the said Geo. Waring, and the said Robert S. Carter, by the name, style, and description of R. S. Carter, trading and doing business by the said style, and firm of Tunstall, Waring, & Co., or order, the said sum of money therein specified, according to the tenor and effect thereof,

and as their act and deed, then and there delivered, the said last mentioned writing obligatory to the said James M. Tunstall, George Waring, and Robert S. Carter, partners as aforesaid, and the said James M. Tunstall, who sues in this suit by his next friend aforesaid, and George Waring, plaintiff, as aforesaid, and the said Robert S. Carter, then and there accepted and received the same of and from the said William F. Pope, Alexander V. Brookie, and Nicholas Peay, in full satisfaction and discharge of the said debt, founded upon the writing obligatory in the declaration of the said plaintiffs mentioned, and the damages and interest thereupon due, and owing, and accrued: and this the said Pope is ready to verify; whereupon he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him, &c.," both of which pleas were on motion of the plaintiff, in the court below, stricken out upon the ground that they were insufficient and inapplicable to the cause, to which opinion of the court, so far as relates to the second plea, Pope excepted, and his bill of exceptions was signed, sealed, and made a part of the record in this cause; whereupon, the plaintiffs entered a *nolle prosequi* as to Dunahay; and Pope not saying any thing further in bar or preclusion of the plaintiff's demand, and it appearing that the action was founded on a writing obligatory, judgment was entered against him for the sum of \$1,109 85 in debt, together with ten per cent. interest per annum, on said debt, from the 19th day of July, 1836, until the same should be paid as damages, with costs.

To reverse this judgment Pope sued out his writ of error.

ASHLEY & WATKINS, for plaintiff in error:

The only point arising in this case, is whether the court below erred in striking out the second plea, being a plea of accord and satisfaction of the defendant in the Circuit Court.

The question here is not whether the plea is a good plea, that is, sufficient in law, nor whether the facts set out in it are true; but the question is whether the plea is so irregular and informal as to have authorized the Circuit Court in striking it off the files. That the plea is well pleaded, and that the facts in it are true, will rest upon the

plaintiff in error to establish, when he shall have an opportunity afforded him to do so.

The law authorizing a court to strike out papers, which have been improperly placed on the file, is wholly a rule of practice, which can better be illustrated by instances where courts have exercised that discretion, than by any general definition.

A court will strike out a paper. 1st. Where it filed in a cause by mistake. 2nd. Where a plea, or the like, is entitled of a wrong cause, and appears to have no connection with the cause in which it is filed. 3rd. Where a plea is not signed by the party or counsel. 4th. Where a party attempts to plead a plea, *prior* in the order of pleading, to one which he had before pleaded. 5th. The plea of *non est factum*, or plea in abatement not sworn to, and the like. 6th. Where the same matter is repeated in several counts in a declaration, or in several pleas, so as to become frivolous, vexatious, (or expensive, in those states where costs are taxed according to the number or length of the pleadings.)

There may be other instances where a court will strike a paper off the file, but they all tend to show that the ground of such a proceeding is that it is wanting in some formal requisite or pre-requisite, and that it does in no instance relate to that which is contained in the body or substance of the plea itself, unless it be in the case where there is a frivolous or vexatious repetition of the same matter. See 1 *Chit. Plead.* 7 *Am. Ed.* 1837, p. 701, and the cases there cited in notes.

The idea in striking out a plea is that it is a nullity; in a demurrer, is that admitting the facts sufficiently stated in the plea to be true, do they constitute a ground of defence or delay. If pleas are not palpably bad, and void upon the face of them, the opposite party cannot treat them as nullities, but must resort to his demurrer. *Platt vs. Robbins*, *Coleman* 81; 3 *Johns. Rep.* 541, *Falls vs. Stickney*; so a plea in abatement, which concludes in bar, a special plea which amounts to the general issue, a special plea in trespass which does not answer the whole declaration, or as much of it as it professes to answer, a formal plea of not guilty in an action of *assumpsit*, are all pleas defective in substance, but if accompanied by what may be termed the

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extraneous formal requisites of a plea, the opposite party cannot treat them as nullities, but must demur or take issue.

So in chancery the practice is similar. "An answer may be ordered to be taken off the file. 1st. If formally defective or incorrect," (as an answer not sworn to, or a joint answer sworn to by but one. 1 *Mad.* 265.) 2nd. "If the defendant has not placed himself in a situation to file it, (as being in contempt.) But an answer will not be taken off the file, because it is delusive, answering only a few facts stated in the bill. The remedy in such case being by exceptions for insufficiency." 3 *Mad.* 437; 2 *Smith's Chancery Prac.* p. 268.

Testing the second plea in this case, then, by the foregoing rules it will be found to be a plea which was entitled to the consideration of the court, and which could not be stricken out. But it was claimed by the plaintiffs, in the court below, that the plea should be stricken out; first, because it set up an accord and satisfaction by the execution of a new note with security to them, and a third person not a party to the suit; and second, that it contained matter of defence in equity, but not at law. We insist that the plea is a good one, even in view of these objections, though they could not arise on the the motion to strike out.

FOWLER, *Contra*:

That the second plea was valid in law, is utterly denied by the defendants in error, on the following grounds:

First. Because, in *debt* upon bond, it is *no plea* that the plaintiff accepted a new bond in satisfaction of the old; for that is *no satisfaction* actual and present, as it ought to be. *Vide* 4 *Bac. Abr.* p. 87, title, *Pleas and Pleading*; *Hobart*, 68; 1 *Esp. N. P.* 230; *Cro. Eliz.* 727; 1 *Bac. Abr.* 23.

Second. Because the accord, &c., does not appear to have been *executed* before the commencement of the action. *Vide* 1 *Com. Dig.*, title, *Accord*, (B. 4.,) 9 *Co.* 79, b.; 4 *Bac. Abr.* 87; *Cro. Eliz.* 304; 1 *Esp. N. P.* 230; 1 *Str. Rep.* 23, 573; 3 *East*, 251.

Third. Because said plea alleges no legal transfer of the writing obligatory sued on, by said Tunstall and Waring, to said firm of Tunstall, Waring, & Co., or Tunstall, Waring and Carter, by *assignment*,

or otherwise, it being necessary that the legal right should be vested in them, before they can compound, or receive satisfaction thereof; and the legal rights of Tunstall and Waring, being wholly different and distinct from those of the supposed new firm of Tunstall, Waring, and Carter.

Fourth. Because satisfaction is alleged to have been accepted by different persons, and a different *firm* than the plaintiffs; and made by only *one* of the *debtors*, and by others than those bound in the first obligation, or sued in the court below. *Vide 6 Johns. Rep. 37.*

Fifth. Because the said plea does not allege that the security and circumstances of Tunstall and Waring were bettered by the bond pleaded in satisfaction. It is laid down in *Hobart*, p. 68, in the case of *Lovelace vs. Cocket*, that one bond cannot be pleaded in bar of another, for that is of no greater value unless the security and circumstances are bettered, as by *shortening the time of payment*; and in the case of *Norwood vs. Gripe*, in *Croke's Elizabeth*, p. 727, it was decided that the *bettering the security* alone is not sufficient; for a bond *with sureties* is better than a single bond, and yet the former cannot be pleaded in bar of the latter.

Where a plea is so irregular and defective that a material and substantial issue cannot be made thereon, it can be reached either by demurrer, or motion to set it aside, or strike it out, and the fact of said pretended plea of accord, &c., being joined with that of *nil debet*, evidently such as should be stricken out, shows that both were frivolous and properly stricken out.

PIKE, in response:

The proper enquiry, in this case, ought to be whether the facts, as stated in the plea, if true, form a bar to the action. Yet we do not well see how that matter can be discussed. If the court below had sustained a demurrer to the plea, then its legal sufficiency would have been presented to the consideration of this court, but that was not done. The plea was stricken out for inapplicability; and we can imagine no other reason for this decision, than that one bond could not be extinguished by the giving of another. It must have been on that ground, we presume, that the plea was stricken out. But that is not

all that is pleaded. The plea shows the execution of a new bond, *with additional security*, postponing for four years the payment of the debt; and avers an acceptance thereof, in discharge and satisfaction of the first bond. Is this not a good plea? If it is, it must have been applicable, and if applicable, was wrongly stricken out.

To a declaration upon a bond or deed, the plea of *accord alone*, is not sufficient, and the plea of satisfaction must show the acceptance of another deed in satisfaction; for, as the duty accrues by deed, it cannot be avoided but by matter of as high a nature. But accord and satisfaction may be pleaded to all actions on specialties; though not to actions upon a record. See 1 *Saund. P. and Ev.* 23, 24; *Lowe vs. Eginton*, 7 *Price*, 604; *Kaye vs. Waghorne*, 1 *Taun.* 428; *Snow vs. Franklyn*, *Lutw.* 108; *Alden vs. Blague*, *Cro. fac.* 99; and the law is distinctly laid down in *Blake's case*, 6 *Co.* 43 *b.*, where it is said, "where a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally, and solely, by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personality."

It is very true that some of the older decisions are against us, and in order to ascertain what the law really is upon this point, it will be necessary to review them.

In *Manhood vs. Crick*, *Cro. Eliz.* 710, debt was brought on a single obligation for the payment of £8. The defendant pleaded in bar, that after the obligation made, he entered into another obligation of £14 to the plaintiff, for the payment of £7, at such a day and place as was yet to come, which the plaintiff accepted in *discharge of said bond* of £8. The plea was held ill, on demurrer, without argument. The court will here observe that the second bond was stated to have been received in discharge of the first *bond*, and not of the money due on it; and, also, it was a satisfaction of one sum by a smaller.

Norwood vs. Grype, *Cro. Eliz.* 727, is precisely the same, except that the plea stated the second bond, for a smaller sum, to have been given by the defendant and a third person. Plea held bad, without argument.

So in *Lovelace vs. Cocket*, *Hob.* 68 *b.*, which was debt on an obligation of £100, conditioned for the payment of £52 10s. Plea that at the day of payment, defendant and his son made a new bond of £100, for payment of the same £52 10s., at another day then to come, in full satisfaction of said £52 10s., and that plaintiff so accepted it. Plea held bad, for it was no satisfaction actual and present, as it ought to be. *S. C. Cro. Car.* 85.

So the editor of *Hobart*, in the note to the above case, says that "it is a general rule that the acceptance of a new security of an inferior nature, or of equal degree, is no extinguishment of the former debt; as if a bond be given in satisfaction of a judgment, or if an obligee takes a new bond for the payment of a debt secured by a former bond, in such case the judgment and original bond are not discharged." In support of this position he refers to several cases, some of which we have quoted above; and he refers also to several others, which we will now examine.

Noyes vs. Hapgood, *Cro. Jac.*, quoted to sustain the position, was debt on an obligation for £80, conditioned for the performance of divers covenants contained in articles of agreement. The plea was, that it was agreed by plaintiff and defendant, that defendant should grant an annuity of five pounds out of such land for life, in discharge of the bond; which grant he made accordingly, and plaintiff accepted it, in discharge of the bond. The plea was held bad, because it was but a concord and verbal agreement, which can never be a discharge of a speciality.

In *Balston vs. Baxter*, also quoted, the plea was of part payment, and a promise to pay the residue at a certain time, and an acceptance of the promise in satisfaction of the money due by the obligation. The plea was held bad, because it was a concord pleaded, and executory, and so could be no bar: and the court remarked that in debt upon an obligation, it is no plea that plaintiff accepted another obligation in recompense of it.

In *Simonds vs. Mewdesworth*, *Cro. Car.* 193, the point decided was that agreement without satisfaction is to no purpose, and in that case part of the satisfaction had not been performed. That point is doubted no where. Thus, C. J. EYRE said, in *Lynn vs. Bruce*, 2 *H. Bla.*

317, "accord executed is satisfaction; accord *executory* is only substituting one cause of action in the room of another, which might go on to any extent." So in *Allen vs. Harris*, 1 Lord Raym. 122, it was decided that an accord before execution, is no bar. It is needless to multiply cases on this point. It has been so often decided, that it was said in the last mentioned case, that a decision to the contrary would overthrow all the books.

In *Blythe vs. Hill*, 1 Mod. 225, NORTH, C. J., held that if a second bond is given by the obligor himself, it would not have discharged the former. But he said that "here, where it is given by the administrator, so that the plaintiff's security is bettered, &c., it may be a discharge of the first bond." *Atkyns* stated the general rule to be, that "one bond cannot be given in satisfaction of another."

In *Peck vs. Hill*, the plea was held good, because there was other security given than what the plaintiff had before; for where the condition is for payment of money to the party himself, there if he accept any collateral thing in satisfaction, 'tis good. And, that if a security be given by a stranger it may discharge a former bond. *Atkyns* doubted, but inclined that one bond could not be discharged by giving another.

So it is said in *Lutterford vs. Le Mayre*, Cro. Jac. 579, it is said, that to give another action upon a bond is not sufficient to avoid a bond.

In *Higgins' case*, 6 Co. 45, it was held that where the plaintiff was alleged in the plea to have taken a statute staple for the same debt, and in full satisfaction of the bond, though the statute was matter of record, and of a higher nature than the bond is, yet the bond remains in force, and the plaintiff may have his action either on one or the other.

In *Jackson vs. Shaffer*, 11 J. R. 517, a bond and warrants of attorney had been taken in satisfaction of a judgment; and the court remarked that they were not a security of a higher nature: and where a creditor takes a new security, of an equal or inferior degree, it is not an extinguishment of an original debt.

In *Jackson vs. White*, J. R. 58, it was held that sealed notes, executed by two persons, were not extinguished by the obligee taking the

bond and mortgage of *one* of them for the balance due on the notes. This decision was based on *Hardwick vs. Mynd*, 1 *Ans.* 3, where it was held that when a mortgagee took a bond from the assignee of the devisee, for the arrears of interest then due, and gave a receipt, the bond remaining unpaid; the interest was still secured by the mortgage.

In *Cumber vs. Wane*, *Str.* 427, it was said that "in the case of a bond, another has never been allowed to be pleaded in satisfaction, *without a bettering* of the plaintiff's case, as by shortening the time of payment. Nay, in all instances, the bettering of his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction." This case was denied to be law, in *Hardcastle vs. Howard*, *H.* 26, *G.* 3, *B. R.* See *Heathcote vs. Crookshanks*, 2 *T. R.* 28.

These cases would seem to establish the principle that one bond could never be extinguished by the giving of another for the same debt; and furthermore that a plea that a new bond, with security, was given *and accepted in discharge of the debt accruing under the first bond*, would always be a bad plea. But there is a current of authorities, co-temporaneous with, and subsequent to, those first cited, which qualify, and very much limit the doctrine above laid down; and to these we now desire to call the attention of the court.

Neal vs. Sheffield, *Cro. Jac.* 254, was debt on an obligation conditioned for the payment of seven pounds at the birth of the plaintiff's child. The defendant pleaded, that before the birth of the child it was agreed betwixt the plaintiff and defendant, whereas the plaintiff was to have a load of lime of the defendant, for which he should be indebted to him, that the defendant should acquit him thereof, and accept of that debt in satisfaction of said obligation; and that the plaintiff, such a day, year, and place, accepted of the said load of lime in satisfaction of said bond. The second ground of demurrer to the plea, assigned by *Yelverton*, was, that the defendant pleaded that the plaintiff accepted the load of lime in satisfaction *of the bond*, which cannot be; but it ought to have been pleaded in satisfaction *of the sum* mentioned in the condition of the bond, for the bond itself cannot be discharged without specialty. And, *for this cause*, all the

court held the plea to be ill, and therefore adjudged for the plaintiff.

In the same case, in *Yelverton*, 192, it is said that it was adjudged for the plaintiff for two reasons: the first of which was, because the defendant pleaded his bar in discharge of the bond, whereas he ought to have pleaded it in discharge of the sum contained in the condition of the bond; for it is not a debt simply by the bond, but the performance or breach of the condition makes it a debt, for the bond is guided by the condition, so that if the condition is not discharged, the bond remains in force, and the matter of the bar is not pleaded in discharge of the condition, but of the bond, and therefore it is not good.

Preston vs. Christmas, 2 Wils. 86, was debt upon bond. Defendant pleads accord and satisfaction, viz: That he released to the plaintiff all his equity of redemption of certain tenements, in satisfaction of all bonds wherein the defendant was bound to the plaintiff. The second ground of demurrer to the plea was, that the accord and satisfaction ought to be by deed; and that though where there appears to be a condition for payment of money, an accord *may be pleaded in satisfaction of the money or condition*, yet it cannot be pleaded in satisfaction of the deed or obligation; and that for any thing appearing on the record, the bond in that case was without any condition at all. *Hewett, contra*, thought it was the same thing whether it was pleaded in satisfaction of the bond, or of the money, or debt owing upon the bond; and that it would have been a good plea if it had been pleaded in satisfaction of the money seemed to be admitted by the cases cited on the other side. (*Neal vs. Sheffield*, and *Blake's case*.) The court decided that this being a debt upon an obligation without any condition, satisfaction must be pleaded to be by deed.

In *Pinnel's case*, 5 Co. 117, debt was brought on a bond in the penalty of £16, conditioned to pay £8 10s. on November 11, 1600. Plea, that on the 1st of October, 1600, defendant paid plaintiff £5 2s. 2d., which the plaintiff accepted in full satisfaction of the money mentioned in the condition. The plea was held bad, in not stating that the money *was paid* in full satisfaction. But for that defect, the demurrer would have been overruled.

So in the cases of *Manhood vs. Crick*, *Norwood vs. Grype*, and

Noyes vs. Hapgood, above quoted, the plea stated that the accord "was received in satisfaction of *the bond*, and not of the debt or money; and the same destruction was taken in *Alden vs. Blague*, *Cro. Jac.* 99.

In an anonymous case, *Cro. Eliz.* 46, the defendant, to an action of debt upon an obligation to pay £40, at *Michaelmas Eve*, (the evening before Michaelmas day,) pleaded a concord between him and the plaintiff, that if he gave him a hawk and £20 at Michaelmas day, *the obligation* should be void; and that he gave the hawk and £20 at the day, and the plaintiff accepted it. The plea was held bad, and the reason assigned is, that the bond was forfeited at *Michaelmas eve* by non-payment; and so because single; which cannot be discharged by such a naked averment *in fait*, of such an acceptance, although the agreement was before the day, *but acceptance before the day would have been a good discharge*.

In *Kaye vs. Waghorne*, 1 *Taun.* 428, the plea was that an obligation to indemnify against any claim of dower of defendant's wife, was accepted in satisfaction of a *covenant*, that defendant and wife would levy a fine. The plea was held bad, because a covenant under seal, not broken, could not be discharged by parol agreement.

In *Lynn vs. Bruce*, 2 *H. Bla.* 317, the count stated, that in consideration that the plaintiff, at defendant's request, *had consented and agreed to accept and receive* from the defendant a composition of fourteen shillings in the pound, upon a sum due from defendant to plaintiff on a bond for so much, in full satisfaction and discharge of the bond, and all money due thereon, the defendant promised to pay the composition. The court said that it was settled in *Allen vs. Harris*, quoted above, "that upon an accord, which this is, no remedy lies;" and that no remedy lies on an accord executory, because it is no bar. But it was not denied that an accord executed, would have been a good bar to an action on the bond.

As was well remarked by VAN NESS, J., in *Watkinson vs. Inglesby*, 5 *J. R.* 389, "there is more nicety than good sense in some of the cases on this subject," (accord and satisfaction.) "*Accords are favored by law*, and if so, they ought not to be too rigorously expounded."

And the modern cases have gone far to sustain such pleas, wherever it has appeared that additional security had been taken.

Thus in *Booth vs. Smith*, 3 Wend. 66, in which the first count in the declaration was on a due bill for \$400, dated March 17, 1826, payable on demand; the plea to that count was, that before the commencement of the suit, on account stated, the defendant was found indebted \$270 on the due bill, for which sum he then and there, to wit, on the 15th April, 1826, delivered to the plaintiff a promissory note, made by three other persons to the defendant, for \$270, dated April 15, 1826, which he, the defendant, then endorsed to the plaintiff; and that the plaintiff then and there accepted and received the said last mentioned note for and on account, and in full satisfaction of the note in the first count mentioned. The court said that the plea was unquestionably good; and would have been good by way of accord and satisfaction, if no part of the original debt had been paid prior to the acceptance by the plaintiff of the last note. And they referred to *Boyd and Suydam vs. Hitchcock*, 20 J. R. 76, where it was held, that if a debtor gives his note endorsed by a third person, as further security for part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and may be pleaded in bar as an accord and satisfaction; and said, that the additional security required by the creditor for part of his debt is a good consideration for the relinquishment of the residue. In support of this principle, they referred to *Le Page vs. McCrea*, 1 Wend. 172, *Kearslake vs. Morgan*, 5 T. R. 513, and *Hughes vs. Wheeler*, 8 Cowen, 79; and decided that where the new note was given for the whole amount due, and accepted in full satisfaction of it, it must necessarily operate as an extinguishment of the original consideration. The reasoning of the court, in this case, is exceedingly cogent and persuasive; and no reason can be offered why it should not apply as well to bonds as to promissory notes, where the place of one instrument is supplied by another of equal dignity.

In *Russell vs. Lytle*, 6 Wend. 390, it was held that to an action of debt on a money bond, a plea averring an agreement by plaintiff to accept a surrender of the lands, mortgaged as collateral security, and a tender of performance by the defendants, was not a bar, because it

showed an accord not executed; but it was not denied that if the surrender had been made, the plea would have been good.

The doctrine laid down in *Boyd vs. Hitchcock*, 20 J. R. 76, and *Booth vs. Smith*, 3 Wend. 66, is relied upon and confirmed in *Kellogg vs. Richards*, 14 Wend. 119.

So in *Steinman vs. Magnus*, 11 East, 390, Lord Ellenborough said, "it is true that if a creditor simply agree to accept less from his debtor than his just demand, that will not bind him; but if, upon the faith of such an agreement, a third person be lured in to become surety for any part of the debt, on the ground that the party will be thereby discharged of the remainder of his debt, the agreement will be binding."

In the present case the plea shows that Pope, being jointly bound with Dunahay in the first bond, gave the second, after the first had become due, with two new sureties, to the obligees in the first bond, and a third person who had become their partner, and that the plaintiffs accepted and received it in full satisfaction and discharge of the debt, damages and interest accrued under the first bond.

We believe that upon a full and fair consideration of all the authorities, this will be found to be good matter in bar. At all events, no instance can be found in the books where the course adopted with such a plea was to strike it out. If the matter contained in the plea is not sufficient to bar or preclude the plaintiff's action, it was demurrable. It was not stricken out because it was false, but because it was inapplicable to the case; which means, if it means any thing, that it does not contain matter in bar. But the party was entitled to have his plea stand upon the record, and have the benefit of it here—and it does not follow that it should have been stricken out because it would have been bad on demurrer. That could not be done even if the court below had previously held a plea precisely like it, bad on demurrer. See *Davis vs. Adams*, 4 Cowen 142.

DICKINSON, Judge, delivered the opinion of the court:

Not deeming it necessary to discuss the principles upon which pleas are stricken out by the court, we will consider the proceeding in the same light as if the pleadings had come up on demurrer.

The defendant in error contends that in debt upon bond, it is no plea that the plaintiffs accepted a new bond in satisfaction of the old one, for that is no satisfaction, either actual or present; and refers to various authorities in support of his position. If he has reference only to cases where there is a simple exchange of bonds, or obligations, his argument cannot, in truth, be controverted, for the satisfaction must, in legal contemplation, be advantageous to the party agreeing to accept, for it would be inoperative if it could not possibly afford him some equivalent or consideration. *Bacon Ab. accord, A.; Com. Dig. accord B. 1.* There must be some change, or rather difference, between the former and the latter contract to show that the parties intended to alter it by substituting something more advantageous to the creditor than he before possessed, as by shortening the time, giving other security, or the like. *Hobart, 68.* And it is a rule that to a bond, accord and satisfaction can be pleaded by deed only, for an obligation under seal cannot be discharged but by an instrument of at high a nature as the obligation itself. *2 Wils. 86.* In the case of *Lynn, and another, vs. Bruce, 2 H. Black, 317,* where the plaintiff, at defendant's request, had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound and so in proportion for a lesser sum than a pound, upon a debt due from the defendant to the plaintiff on a bond for two hundred pounds in full satisfaction and discharge of the sum and all money due thereon, and the defendant promised to pay the compensation. A part thereof only was paid, and an action brought for the residue.

The consideration of the promise was on an agreement to accept a composition, and judgment was signed for the balance. Lord Chief Justice *Eyre*, in delivering the opinion of the court said, "that it was settled in the case of *Allen vs. Harris, 1 L. Raym. 122,* upon consideration of all the cases that upon an accord no remedy lies," and that it was said that the books are so numerous that an accord ought to be executed, that it was impossible to overturn an the authority—the expression is "overthrow all the books." This doctrine is well settled, and upon sound principles. Accord executed is satisfaction. Accord executory is only substituting one cause of action in the room of another, which might go to any extent. The cases in

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which the question has been raised whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action; but the reason given in three of the cases *Rol. Al. title, Accord*, pl. 11, 12, 13, is because the plaintiff hath not any remedy for the whole; or, where part has been performed for that which is not performed, which goes directly to the gist of the action.

An accord must be completely executed in all its parts before it can produce legal obligation or legal effect. In *Peyton's case*, 5 Co. 79, referred to by the defendants in error, it was held that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action; but that there must be an acceptance in satisfaction. See also the two cases in *Cro. Eliz.* 304, 305, to the same effect.

A plea simply alleging acceptance of a smaller sum of money in satisfaction of a larger sum has been repeatedly decided to be bad. 5 Coke, R. 117, *Pinnel's case*; 9 Coke, 89; 5 John. R. 386, *Watkinson vs. Inglesby*; 5 T. R. 513, *Kearslake vs. Morgan*; 2 T. R. 28, *Heathcock vs. Crookshanks*; 1 Str. 425, *Cumber vs. Ware*; 17 John. 160, *Seymour vs. Mitike*; and numerous other authorities hold to the same principle. But it has always been held that a plea alleging the payment of a less sum before the day of payment stipulated in the contract or at a different place; or the delivery of a specific article in satisfaction, and an acceptance in satisfaction by the plaintiff, was a good plea. 5 Co. 117. So a plea, alleging the payment of a less sum by a third person, and the acceptance of it by the plaintiff in satisfaction is a good bar, 11 East, 305, *Steinman vs. Magnus*; 1 New-Hamp. R. 279, *Coburn vs. Gould*; 2 D. and E. 763, *Cockshot vs. Bennett*. The reason why the payment of a less sum by the debtor, in satisfaction of a larger sum, cannot be adjudged a satisfaction is, according to Lord Coke, because "it appears to the Judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum." But the gift of a chattel is good, because it may be intended to be more beneficial to the plaintiff, although of less value than money. 5 N. H. R. 136, *Clarke vs. Dinsmore*.

It is laid down as a general principle that accord without satisfaction

is no bar to an action of debt; that is, that accord being a promise to confer satisfaction must be fully and actually executed and accepted in order to confer satisfaction, and operate as a defence to such action. As for instance, if an agreement is made to do a thing in satisfaction at a future day, and it is done and accepted at that time, it is a legal satisfaction. The party cannot sue while it is only executory, but here is an accord with satisfaction, and the previous claim is extinguished. In support of these positions see *Bacon's Ab. Accord A.*; *Com. Dig. Accord B. 4*; *Allen vs. Harris*, 1 *L. Ray.* 122; *Watkinson vs. Inglesby*, 5 *J. R.* 386. In the case of *Blenn vs. Chester*, 5 *Day*, 359, it was said that if the agreement that satisfaction should be rendered by the defendant, or a third person, at a future day, be not founded on a new consideration, and afford a fresh right of action, it would be no bar to an action on the original demand before the time prescribed for rendering satisfaction. Many of the authorities referred to by the defendants were expressly decided upon the ground of accord without satisfaction.

In the case of *Cose vs. Barber*, *T. Raymond* 450, one ground of decision there was, that the satisfaction was to be rendered in part by a third person who was party to the accord, but the plea did not show that the promise was in writing. In *Com. Dig. Accord B. 4*, it is expressly laid down that "an accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy at law to compel the performance, and this doctrine is sustained in the case of *Gordon vs. Cheeseman*, 1 *B. & A.* 325 and 702; also, in the observations of *Grose* in *James vs. David*, 5 *T. R.* 143.

In the case of *Boyd, and others, vs. Hitchcock*, 20 *J. R.* 76, it was declared that if a debtor give his note, endorsed by a third person, as further security for a part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and it may be pleaded in bar as an accord and satisfaction. The additional security required by the creditor for a part of the debt is a good consideration for the relinquishment of the residue. *Le Page vs. McCrea*, 1 *Wend.* 172; *Kearslake vs. Morgan*, 5 *T. R.* 513. This doctrine is confirmed in *Hughes*

vs. Wheeler, 8 Cowen, 79, and the distinction is there taken between the note of a third person, and that of the debtor himself for the original debt. So the acceptance in full satisfaction by a creditor of the note of a third person, endorsed by his debtor, for the whole amount of a previous note given by the debtor, may be pleaded as an accord and satisfaction to an action on the previous note.

In *Booth vs. Smith*, 3 Wend. 68, it is said to go upon the principle that although the defendant still remains liable, the character of the responsibility is changed, and he cannot be charged on the original consideration.

An express agreement by a creditor to take a bill or note for the full amount of his debt as an absolute payment or extinguishment thereof destroys the right of action for such debt, and leaves the creditor without remedy except upon the instrument. *Brown vs. Kewley*, 2 B. & P. 518; 10 Vesey, 201; *Camidge vs. Allenby*, 6 B. C. 381; *Sheehy vs. Mandeville* 6 Cranch, 253; *Burdock vs. Green*, 15 J. R. 247; *Hughes vs. Wheeler*, 8 Con. 77.

In the case of *Wilkinson vs. Inglesby and Stokes*, 5 J. R. 385, where A. pleaded that he, together with B., being indebted to C., and several others, agreed to assign all the stock in trade and outstanding debts to C. and the other creditors, who agreed to accept the same in full satisfaction of their respective debts, and averred that he and B. did deliver all their stock in trade, and assign all the debts due to them, for the use and benefit of C. and the other creditors, which delivery, and assignment of debts, was received in full satisfaction by C. and the other creditors, &c. There was a demurrer to the plea that it was agreed to assign without averring that the plaintiff was a creditor, or that they assigned, and that it was not set forth to whom the assignment was made. *Van Ness, J.*, in delivering the opinion, said "that it was a plea of accord and satisfaction, and he thought it was a good plea," &c.; that there was more nicety than good sense in some of the cases on this subject; that accords are favored in law, and therefore ought not to be too rigorously expounded. The court decided that the agreement was sufficient, and overruled the case of *Preston vs. Christmas*, 2 Wils. 86, where an assignment of an equity of redemption was declared not to be pleadable as ac-

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cord and satisfaction ; and said that the plaintiff in the case before them agreed to receive such assignment, and that the accord was executed. It avers delivery and assignment, and that the assignment and delivery were received by the plaintiff in satisfaction of the debt. In the case of *Cumber vs. Ware*, 1 Str. 426, Chief Justice Pratt said, "that it must appear to be a reasonable satisfaction; at least, the contrary must not appear as it did in that case."

The current of decisions is, and we believe correctly, that although accord executory is no bar, yet an accord executed is good: and all the authorities agree in this. *Rol. Al. title, Accord, pl. 14*; 2 *Lord Raym.* 122; 2 *H. Bla.* 317.

The acceptance in satisfaction is the essence and gist of the plea, and Lord Coke, in *Peyton's case*, 9 *Coke*, 86, recommends as the best way of pleading an accord to plead it by way of satisfaction only.

In the case of *Booth vs. Smith*, 3 *Wend.* 66, it was decided that acceptance in full satisfaction by one creditor of the note of a third person for the whole amount, of a previous note given by his debtor, is an extinguishment of the original consideration, and such acceptance may be pleaded in bar to a recovery on an original note. The obligation upon which this suit is brought is dated the 19th May, 1838, payable to Tunstall and Waring sixty days after date for 1,109 85, oyer of which was ordered and granted. The defendant below then sets out in his plea that after the execution of the said writing, to wit: on the 25th January, 1839, the plaintiff below took into partnership Robert S. Carter, as well in the matter of the note sued on, as in trade and merchandize, and that before the institution of the suit, he executed the subsequent writing obligatory, with A. V. Brookie and N. Peay, to said Tunstall, Waring, & Co., under the name of Tunstall, Waring, & Co., for \$1,186 86, and avers that the same was accepted and received by the said Tunstall, Waring, and Carter, in full satisfaction and discharge of the said debt, founded upon the writing obligatory in the declaration mentioned, and of all damages and interest due, and owing, and accrued.

The rule by which partners become liable under the contract of partnership has given rise to a general rule in the course of legal proceedings by which the act or admission of one partner, as likewise

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notice to one partner is held to be binding upon the others, and in all contracts by parol or otherwise, they only who were partners at the time can join, and therefore a person who enters the partnership after the completion of the contract cannot be made a plaintiff, unless the debtor shall admit him as creditor, and it be agreed between the partners that the contract with the old firm be extinguished, and a contract with the new firm established. *Wilford vs. Wood*, 1 *Esp.* 182. Under the latter such partners may sue. Was there such new contract made? It is not only averred that the individuals comprising the new firm were joint owners of the writing sued on, but that all of the partners accepted and received the last writing obligatory in full satisfaction and payment of the first. And can it be denied that they had the power to do so.

That the right to change the partnership, so far as related to themselves, extinguished the old debt by making a new contract in the name of the new firm cannot be controverted. If then this position be conceded as correct, and we believe it to be so, an assignment from the old to the new firm, to enable them to form a second contract upon the basis of the former one, would, so far as their interests were involved, have been a nugatory or, at least, a hopeless act.

Shortening the time of payment alone is not the only case as contended by the defendant in error in which a plea of this kind would be good. Any change or alteration which renders the creditor's situation more advantageous, or the debt more secure will suffice. Here the parties not only have the same security as regards Pope, but the additional security of Brookie and Peay, upon as high an obligation as they possessed before. The plea avers that the parties did accept, and is so pleaded, as we conceive with sufficient certainty, and shows the satisfaction to be reasonable; at any rate, nothing to the contrary appears upon the face of the pleadings.

Wherefore, we are of opinion that there was error in the proceedings of the court below in striking out the second plea. The judgment of the Circuit Court must therefore be reversed with costs, and this cause be remanded to the court from whence it came for further proceedings to be had therein according to law, and not inconsistent with this opinion.

DUNN against THE STATE.

APPEAL from Phillips Circuit Court.

Testimony of a person's guilt, or participation in the commission of a crime, or felony, wholly unconnected with that for which he is put upon his trial, cannot, as a general rule, be admitted.

But where the *scienter* or *quo animo*, is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt, in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or interest, is competent; notwithstanding they may constitute in law a distinct crime.

But proof of a distinct murder, committed by the prisoner at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time, in which the prisoner participated, cannot be admitted, until proof has been given, establishing, or tending to establish the offence with which he is charged and showing some connection between the different transactions; or such facts and circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by some circumstance connected with the former; in which case, such circumstances connected with the former, as are calculated to show the *quo animo* or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction, are competent and legitimate testimony.

The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, is, that they were made at a time when, in the mind of the deceased all expectation of recovery was yielded up, and supplanted by the conviction that he would certainly die by reason of the injury received, and under which he then languished.

When every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court.

That such declarations were made under an apprehension of impending death, may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension.

Nor is it essential that the party should apprehend *immediate* dissolution. It is sufficient if he apprehends it to be impending and certain; and this is always a question for the court to determine, upon consideration of all the surrounding circumstances.

The deposition of a witness, concerning a killing, taken under our statute before the Coroner, reduced to writing, subscribed by the person examined, and attested by the Coroner, and by him returned to the Circuit Court with the inquest, is a written document, which by authority of law, is constituted the authentic and appropriate instrument of evidence, of what the witness then stated; and the deposition itself being in evidence and attainable, being in court, in the hands of the Attorney of the State, oral evidence of the contents thereof could not legally be admitted on the part of the prosecution in a trial of such witness for the murder.

Moreover, by the statute, the evidence so taken before the Coroner, cannot be used against the person giving it, in a subsequent prosecution for the same killing: and therefore, neither the deposition of the defendant in this case, taken before the Coroner, nor oral testimony of its contents, could be used against him.

In appeal or writ of error, in criminal cases, the statute requires the Supreme Court to consider the whole record, (no assignment of errors being necessary,) and to render such judgment thereon as may appear to be authorized by law.

2	229
58	54
2	229
60	158

2	229
68	367

2	229
75	145

2	229
71	561

2	229
179	297
81	419

2	229
88	582

Dunn against the State.

All courts, unless restrained by some statutory provision, have the right of adjourning their sittings to a distant day ; and the proceedings had at the adjourned session, will be considered as the proceedings of the term so adjourned.

The Circuit Courts, in this State, as contra-distinguished from the Judges, have, unalterably, by the Constitution, the exclusive original judicial cognizance of all crimes amounting to felony at the common law.

No judicial power whatever is conferred by the Constitution upon the Judge, as contra-distinguished from the court, unless he can derive it from the power with which he is clothed as a conservator of the peace, or of adjudicating certain cases upon *habeas corpus*.

To constitute a court, there must be a place appointed by law for the administration of justice ; and some person authorized by law to administer justice at that place, must be there for that purpose.

And if the law prescribed no time for holding the court, the Judge might lawfully hold it when, and as often as he chose. So if the place were left to his election, instead of being fixed and prescribed by law, he might lawfully sit in judgment where he pleased, within the Territorial limits prescribed to his jurisdiction.

But in this State, both the time and place of holding the terms of the Circuit Court in each county are prescribed by law ; and in many counties the duration of the terms limited to a single week.

Under particular circumstances, a special term of any Circuit Court may be held for the trial of persons confined in jail, upon the Judge making out a written order to that effect, and transmitting it to the clerk, who is to enter it on the records of the court, and notify the Prosecuting Attorney.

The authority to hold such special term depends upon the following facts and circumstances:—*First*. That some person is confined in jail, who may be lawfully tried upon some criminal charge. *Second*. That it shall not interfere with any other court to be held by the same Judge. *Third*. That it shall not be held within twenty days of the regular term of such court. *Fourth*. That an order therefor be made out by the Judge and by him transmitted to the Clerk. *Fifth*. That the same be entered on the records of the court.

And the power to hold a special term, being a special power, every circumstance necessary to its exercise, must exist, and be made to appear of record ; otherwise the power cannot appear to have been legally exercised.

The power of the court, at such special term, is confined to the trial of the persons confined in jail when the order was made, which must be at least ten days before the term ; and no other persons can be tried at such term.

The order for a special term must therefore be made at least ten days before the commencement of the term, must designate the persons to be tried, state that they are confined in jail, and whether they have been indicted or not ; and if they, or either of them, have not been indicted, must contain a direction to the Clerk to issue a *venire* for a grand jury ; and such order must be transmitted to the Clerk, and by him entered on the record of the court.

When this is done, if the time fixed in the order for the special term, interfere with no other court to be held by the same judge ; and is not within twenty days of the regular term ; and if then the record further shows that the Judge, authorized by law to hold such court, was present at the time fixed in the order, and at the place prescribed by law for holding such court, the court will be legally constituted ; and in regard to such persons as are confined in jail and designated in the order, may exercise judicial power.

And where a special term is held, without any such order being entered upon the record, the proceedings at such term must be considered as proceedings before the Judge simply, as contra-distinguished from the court ; and cannot be regarded as the judicial proceedings and adjudications of the Circuit Court.

Such proceedings, therefore, are *coram non judice* and void ; and the life of the person so convicted cannot be considered as having been, in contemplation of law, once put in jeopardy ; and he may yet be lawfully tried as if no such proceeding had ever taken place.

The appellate jurisdiction of the Supreme Court of this State, under the Constitution does not, nor can it be made to, extend to the proceedings or decision of any officer or tribunal whatever, other than the *judicial* proceedings or determinations of some court or Justice of the Peace, vested under the Constitution with some portion of judicial power.

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And the proceedings at the special term being *coram non judice*, the Supreme Court has no appellate jurisdiction of the case; and it will be dismissed; and a perpetual *supersedeas* awarded to all proceedings had at the special term in the case.

By an indictment of the grand jury of Phillips county, returned to and filed in the Circuit Court of said county on the 11th day of May, at the regular term thereof, held in May, 1839, the appellant was charged as accessory before the fact, to the murder of *John Williams*, thereby charged as having been committed in said county, on the 9th day of January, 1839, by *William Broadus* and *John Lucas*, who are also charged and indicted by said grand jury in the same bill as the principals in said murder. After said indictment was brought into court by the grand jury, a writ of *capias ad respondendum* founded thereon was issued out of said court against the said *Broadus*, *Lucas*, and *Dunn*, addressed to the Sheriff of said county, and made returnable to said county on the first Monday in November, 1839, by virtue of which the Sheriff on the 12th day of May, arrested and took into his custody the body of said appellant, and committed him to the jail of said county. After setting forth the facts above stated, the transcript of the record, contains the following statement, viz: "And at a special term of the Circuit Court, began and held at Helena, within and for the county of Phillips, in the State of Arkansas, on the 12th day of August, A. D. 1839, before the Hon. *John C. P. Tolleson, J.*, the following proceedings were had in the case of the *State of Arkansas vs. Hiram Dunn*, who was indicted as an accessory before the fact, to the murder of *John Williams*." The record then states that the appellant on the 13th day of August, 1839, was brought into said court, in the custody of the Sheriff, and arraigned on said indictment, "whereupon said defendant waived his right to a service of a copy of said indictment, and consented to plead forthwith to the same, and thereupon he pleaded that he was not guilty, in manner and form, as was charged in said bill of indictment, for his trial put himself upon the country, and the Attorney prosecuting for the State, doth the like." The court then awarded a *venire facias* for thirty-eight good and lawful men, from whom to select a jury in this behalf, and directed the same to be made returnable at nine o'clock the next morning, which was accordingly returned into court the next day, "and the said defendant having waived all right to a service of a copy of said panel

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consented to proceed forthwith with the selection of a jury in this behalf"—the record then shows that nine jurors were selected from said panel when the same being exhausted, "the court, by the consent of the defendant, ordered the Sheriff to summon others from among the by-standers, of whom three others were chosen jurors, making, as the record states, "twelve good and lawful men of the county of Phillips, who being first sworn well and truly to try the issue joined, and a true verdict to render, according to evidence, were, by consent of parties, committed to the charge of the Sheriff, by him to be kept separate and apart from all persons, and to be brought back into court" the next day at eight o'clock. The record then shows that the jury was brought into court on the next day, and the trial proceeded in, and continued from day to day until the 16th day of August, when it closed, and the jury returned into court their verdict, as follows, "we, the jury, find the defendant, *Hiram Dunn*, guilty in manner and form as charged in the bill of indictment. Signed, *Uriah A. Clary*, foreman;" which was entered of record in the language above stated, and on the next day the defendant moved the court for a new trial, but his motion was overruled, and he excepted to the opinion and decision of the court refusing to grant him a new trial, and tendered his bill of exceptions, which was signed and sealed by the court, and made a part of the record. The record then states, "and thereupon the said *Hiram Dunn* being called upon to declare what he had to say why the judgment of the law should not be pronounced upon him, responded nothing in bar thereof, whereupon it is considered by the court that the said *Hiram Dunn* be taken back to the common jail of the county from whence he came, there to remain until the thirteenth day of September next, and from thence to the place of public execution, and between the hours of 10 o'clock of the forenoon, and 3 o'clock of the afternoon, of the thirteenth day of September; that he be hung by the neck until he dead."

From this sentence the defendant on the 17th day of the same month prayed an appeal to the Supreme Court, which was granted; but the court refused to stay the execution of the sentence, and ordered a warrant to be made out to the Sheriff of Phillips county, commanding him to execute the sentence previously pronounced

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against the defendant, which was subsequently stayed by the order of one of the Judges of the Supreme Court, made upon inspection of a transcript of the record; and hearing the application therefor made on behalf of said Dunn, after a due consideration thereof. The bill of exceptions of the defendants taken to the opinion and decision of the court annulling his motion and refusing to grant him a new trial, contains a statement of all the testimony given on the trial.

The appellant on the trial and argument of this case before this court, rested his objections to the judgment against him on three exceptions only—

First. That the court erred in admitting evidence of a distinct felony to go to the jury on the trial of the cause.

Second. That the court erred in rejecting and excluding from the jury testimony of the declaration of the deceased Williams that "he had been shot by mistake," when the same ought to have been admitted as his dying declaration.

Third. That the court erred in admitting the parol testimony of the Coroner, to prove the statements made by the appellant Dunn, in giving his testimony before said Coroner on the inquest held by him over the body of the deceased, to whose murder he stands here indicted, as accessory, the said testimony of the appellant having been taken on oath, reduced to writing, subscribed by him and certified by the Coroner.

McPHERSON, for the appellant:

There are three grounds upon which the appellant relies for a reversal of the judgment in this cause. The first that I shall review is "that the court below erred in admitting evidence of a distinct felony, (the shooting of Earnest,) to go to the jury on the trial of the cause."

"No evidence can be admitted which does not tend to prove, or disprove the issue joined." 2 *Russell*, 647. And the same writer urges that the reason and necessity exists much stronger in criminal than in civil cases for the observance of this rule, and of confining the evidence *strictly* to the issue, for the indictment is all that the defendant is expected to come prepared to answer. *Starkie*, and other

elementary writers, maintain the same doctrine, that the defendant can only be tried upon the charges laid in the indictment, and as he is not expected to come prepared to make his defence against the charge of another and separate crime, therefore, the introduction of extraneous evidence is calculated to take the defendant by surprise, and do him manifest injustice, by creating a prejudice against the defendant's general character.

Where several different felonies are alleged in the same indictment, or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the Judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. 2 *Russell*, 649; *Rex vs. Jones*, 3 *Camp*. 132.

"Generally speaking, it is not competent to a prosecution to prove a man guilty of one felony by proving him guilty of another unconnected felony." 2 *Russell* 649; 1 *Leigh*, 574, *Walker vs. Commonwealth*. In connection with the last authority in *Russell*, the learned author goes on to say upon the other hand, "but when several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other," and cites the case of *Rex vs. Ellis*, 13 *C. L. R.* 123, as an example to which case we will again refer. In the case of *Rex vs. Smith*, 12 *C. L. Rep.* 295, indicted for forgery, the prosecution offered to introduce proof of another uttering of a forged note, to show the prisoner's guilty knowledge, but as that uttering had been made the subject of another indictment, the court refused to receive it in evidence, and observed "that although other utterings for which no prosecution had been commenced, have been held to be evidence to show a guilty knowledge, yet, where it is the subject of a substantive charge, it could not be admitted," and the learned Judge observes "that it had been questioned by many able lawyers whether it could be admitted under any circumstances."

The contrary doctrine contended for, relies for support upon the case of *Rex vs. Hough*, 1 *E. C. C.* 120, where upon an indictment for forgery, other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, were admitted as evi-

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dence to show his guilty knowledge; and in the case of *Rex vs. Ball*, 1 Eng. C. C. 132, upon a trial for forgery, other forgeries were admitted to show from corresponding circumstances the guilty knowledge of the defendant, and the same doctrine is laid down in many of the reported English cases. But upon examination, it will be found that the evidence was admitted in cases where it was necessary to establish the guilty knowledge of the defendants, to show that it was not through ignorance or mistake. That the evidence has generally applied to cases of *forgery* and *counterfeiting* where other acts of forgery, or the possession of other spurious coin, were facts that plainly showed the guilty knowledge of the defendants.

In the case of *Rex vs. Ellis*, 13 C. L. R. 123, as referred to in *Russell* as an illustration, was where the prisoner was employed as a Clerk, and as opportunity offered, in going to the drawer for change, purloined different pieces of money, and upon an indictment for the theft of one of the pieces so stolen, the continuous takings of all the peices were permitted to go in evidence, as it went to show that the one piece was not taken by accident or mistake. In the case of *Rex vs. Vake*, 1 E. C. C. 531, evidence of the prisoner having shot at the prosecutor about a quarter of an hour before the time of the shooting charged, was admitted in evidence to show the malice of the defendant. In *Philips' Evidence* it is laid down "that the declarations of a prisoner, made at a former time, are admissible where they tend to prove the intent of the party at the time of the commission of the offence," and gives as an illustration "that on an indictment for murder, evidence of former *grudges* and antecedent menaces may be given to show the prisoner's *malice* against the deceased." *Roscoe C. Ev.* 71.

Dunn stands indicted as accessory to the murder of John Williams. This crime must originate in *malice* towards the deceased, and malice towards Earnest could not be evidence of the malicious intent towards the deceased. It is true that there are some cases laid down in the books, of persons manifesting a general malice towards all mankind, as where a man shoots into a crowd, or throws a timber from a building into a crowded street, without giving warning to the passers by.

This case is not of that kind; from the evidence embraced in the record, it evidently appears that if guilty, the defendant must be

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guilty with malice aforethought towards the deceased, and the malice of the defendant towards Earnest would be no evidence of malice towards the deceased, who was not present or concerned in the first shooting, if the same took place, and the introduction of such evidence was only calculated to create a prejudice against the defendant, which he cannot be expected prepared to answer. But even in cases where such evidence is admissible, what the prisoner said in regard to a collateral matter cannot be given in evidence against him, "as it was impossible that the prisoner could be prepared to contradict it." *Phillips' case*, *Lewin C. C.* 105; *Ros. C. E.* 69. In the present case the only evidence of the defendant's connexion with the first and distinct felony is the overheard conversation proved to have been held with his wife. Strip it of Dunn's conversation, and there is no other evidence to sustain or prove his connexion with the former and separate felony.

The next point relied upon is that the court excluded Williams' declaration that he "had been shot by mistake," which should have gone to the jury as a dying declaration. There are numerous English decisions in regard to dying declarations, and there appears to be some conflict of opinion upon the subject. Where there has been sufficient evidence *without*, the courts appear to have been very cautious in admitting dying declarations, which were always offered in evidence against the prisoner. But where it became necessary to use them they seem in many instances to have relaxed the rule. The numerous decisions are cited in 1 *East*, 353 to 359, and the doctrine appears to have been fully discussed and settled in *Woodcock's case*, 1 *Leach*, 500, and in *Dingler's case*, 1 *Leach*, 504; and from these cases it appears to be the settled doctrine that where the party is *in extremis* at the time his declarations are admissible, and it is not necessary that he should express his apprehension of death, or that he be apprised of his danger, if the circumstances go to show that he was dying or must die, The admissibility of such testimony is to be determined by the court, the *weight* of such testimony is to be left to the jury. The question arises whether the circumstances were sufficient to show that the deceased was *in extremis*, when he made the declaration "that he had been shot by mistake." If they were, the court

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below erred in excluding it from the jury. Before the question was asked, in regard to the declarations of the deceased, it had been detailed in evidence by "Nally," that the deceased had complained of being very *sick*. That he had offered any one \$150, that would take him in a boat down to Dodge's, who lived one and a half miles below; that the witness was present at the Coroner's inquest, and saw two bullet holes in the back of the deceased, one of which the ball had ranged forward through the bowels and lodged against the skin, where it was cut out. Upon an examination of medical authorities, it will be found that when thus wounded it was impossible that he should *live* any length of time. That he did die shortly after appears from the evidence, and that he died of the wounds received there can be no doubt. In the case of *Rex vs. Moseley, and another*, "the declarations of the deceased, made on the day he was wounded, and when he believed he should not recover, held admissible, though he did not die until *eleven* days afterwards, and though the surgeon did not think his case hopeless, and continued to tell him so until the time of his death."

The objection that has generally been made "that the defendant was deprived of the opportunity and advantage of cross examination does not apply to this case," as here it but goes to carry out the benign principle of the law, to administer *justice in mercy*.

The third and last point upon which I rely is that the evidence of Skinner was admitted, which was but secondary, and not the best which the party had it in their power to produce.

The nature and object of evidence is fully explained, and the general rule laid down in 1 *Starkie*, 102, 103, *Randall's Peake*, 10, 11, 13, taking the record as it is, and it appears, that the prosecution offered in evidence the affidavit of Dunn, taken before the Coroner, and it being objected to, they then called Joshua Skinner, the Coroner, who proved, &c., &c. Now all the authors upon evidence, lay it down as the doctrine that where a party offers to introduce testimony and then withdraw it and offer secondary testimony instead, it raises the presumption that the first and last evidence, if introduced, would make against the party offering it, and therefore he will not be allowed to use inferior testimony instead. And the advantages of

written testimony over *parol* are forcibly and clearly pointed out in 2 *Hawkins*, 596, *sec.* 41; and the cases in which written evidence is the highest and best, are noticed in 3 *Starkie*, 1042. By the law then in force, *Steel's Dig.* 305, the Coroner is required upon the examination of dead bodies, to take depositions and return them to court. This requisition is similar to that of the statute of *Phillip and Mary*, 2 *Russell*, 606, and although the English statute does not in express terms make the depositions so taken, evidence in court, yet the law requiring them to be taken and returned to court, they become so, under the general rule that requires the best evidence to be given. See *Rex vs. Smith*, 3 *Com. L. R.* 318. It further has been decided in the case of *Rex vs. Tubby*, 24 *Com. L. R.* 441, "that the affidavit of a person not at the time under suspicion, is admissible in evidence against him if he be afterwards charged with the commission of the offence." Whether we look then to the manifest spirit and intention of the statute requiring the depositions to be returned to court, or to principle, settled in *Tubby's case*, still his deposition was good evidence against him. If so, it was the best evidence, and could not be superseded by *parol*. See *Fearshire's case*, 1 *Leach*, 202; 2 *Rus.* 623. But it may be asked were the facts contained in the affidavit material to the issue? We answer that it was, or at least became so after the introduction of it by the prosecution. The general rule of law makes the whole statement or affidavit of Dunn evidence when introduced by the prosecution. In the affidavit of Dunn he states that he knew nothing of the murder of Williams; which, if true, exonerates him from all guilt, and when it is borne in mind that this statement was made under the solemn sanctity of an oath, at a time when no breath of suspicion rested against the defendant, that upon the trial the truth of this affidavit was only contradicted by *circumstances*, and those *circumstances* only maintained by the oath of a single witness, it would be new law and strange doctrine, devoid of both reason and justice, that under these circumstances would deprive him of its benefits.

CLENDENIN, *Attorney General, Contra:*

Dunn was indicted and convicted as an accessory to the murder of

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John Williams by William Broadus and John Lucas. The statute defines an accessory as one "who stands by, aids, abets, or assists, or who not being present, aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime." *Rev. Stat.* 248. And it is defined by Lord *Hale* to be one who being absent at the time of the offence committed does yet procure, counsel, or command, or abet, another to commit a felony. 1 *Hale*, 616, proof of a prior conspiracy is not *legal presumption* of having aided but only evidence, but if a conspiracy be proved, and a presence to render aid, it is *legal presumption* it was with a view to render aid, and it lies on the party to rebut it by showing he was there for a purpose unconnected with the conspiracy. 9 *Pick. R.* 496.

And testimony may be introduced to show another conspiracy to commit a felony when it indirectly appears that the commission, or the attempt to commit such felony, engenders the malice against the deceased, and as strong presumption of malice on the part of the accused.

One of the points raised and depended on by the counsel of the plaintiff in error is, that the dying declarations of the deceased were not permitted to go to the jury. The importance of this point will be decided by a reference to the testimony taken on the trial of this case, and, upon which testimony, the court below decided that the replies of the deceased to interrogatories put to him were not evidence, it not having been made appear that the deceased apprehended that he was dying, or would die; that this decision was correct, excluding the declaration, cannot be doubted. Upon the examination of the authorities on the subject, it is unquestionable law, that on the trial for murder, the declarations of the deceased, after the mortal wound is given, conscious of approaching death, may be received in evidence against the prisoner, though such declarations were not made in his presence. The principle on which this evidence is admitted, is, that they are declarations made *in extremis*, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silent, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn, and so awful, is considered by law as creating an obligation equal to

that imposed by a positive oath administered in a court of justice. See *Swift's Ev.* 124; 1 *Strange* 449; *Roscoe Crim. Ev.* 22, 23, 24; 1 *Leach*, 502; 2 *Haywood*, 31; 1 *Starkie*, 442.

Whether the deceased was conscious of approaching death is a fact to be decided by the court, in order to admit or reject the evidence of his dying declarations. *Swift's Ev.* 125, and if then it did not appear in the testimony that the deceased was aware of his approaching death, and did not appear to think he was *in extremis*, the court below certainly did not err in excluding his declarations.

Another objection on the part of plaintiff in error is, that the evidence of Joshua Skinner, the Coroner of Phillips county, was permitted to go to the jury instead of the affidavit of Dunn made before the jury of inquest.

All suspected persons may be examined, and their voluntary declarations taken without threats or promises, and reduced to writing, and read to the respective persons, and signed by them if willing. *Sec. 14, p. 195, Rev. Stat.*

Such examinations and testimony shall be certified and signed by the Coroner, and in case of death of the witness his deposition shall be evidence on the trial of any person present at his examination. *Sec. 13, p. 195, Rev. Stat.*

In this case Dunn was examined as a witness, but after such examination he was arrested as a party accused, and on his trial the state offered his affidavit taken before the Coroner in evidence, which was objected to on the part of the defence: the State then called Joshua Skinner, the Coroner, to prove by parol Dunn's statements before the jury of inquest, and permitted the Coroner to refresh his memory by a reference to the affidavit of Dunn. This was undoubtedly the higher and better testimony, even had it been material to the issue: the coroner had no authority to take the examination of Dunn, as a prisoner, on oath, and the statute makes no provision for reading such examination in evidence. The statute refers to witnesses who are deceased since their examination, and when the defendant was present at the examination. That the examinations of a prisoner cannot be taken on oath. See *Roscoe Crim. Ev.* 44; when a prisoner has been examined on oath, on a charge against another

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person. *Parke, J.*, received evidence of that examination as a confession. *Roscoe Crim. Ev.* 44. If the examination was informal, or if the Coroner had no authority to take the examination of the prisoner, the Coroner or magistrate may refer to the examination to refresh his memory. *Roscoe Crim. Ev.* 47, 48. But in this case it is holden that neither the affidavit of the prisoner, nor the testimony of the Coroner, Joshua Skinner, had any bearing in the case, and being immaterial to the issue, the court will not give the point any weight.

Ringo, Chief Justice, delivered the opinion of the Court:

We will consider and dispose of the questions presented in this case in the order in which they are stated, and for the purpose of exhibiting the true ground upon which the first exception is to be decided, it is necessary to set forth so much of the testimony of the same witness, as will serve to show the connection, if any, between the matter objected to by the appellant and admitted by the court, and the criminal conduct charged against him in this case. The bill of exceptions shows that the witness, then under examination, had been called and sworn on the part of the State, and testified, in substance, that she was at the house of the appellant, Dunn, in Phillips county, about the ninth day of January, 1839, setting in the gallery, in company with Dunn's family, William Broadus, Charles Lucas, and a man by the name of Curtis; that she saw the deceased, John Williams, coming up the road with a gun on his shoulder; when in sight of the house he left the road and started around the field. That Dunn took his gun and ran across the field in the direction Williams was going: Williams run also. That after a short time Dunn and Williams returned to the house together; and Dunn said, by God, boys, I got a prisoner. Williams shook hands with the company, and then called for some liquor; and said he was never so frightened in his life as when he saw Dunn coming after him; they all drank together; and Lucas said to Williams, I understand you have offered \$60 to know whose hat was left when *Dutch* was shot, meaning Christian Earnest; Williams said I did. Lucas then said would you give it now. Williams said no, for he had spent part of the money. Lucas then asked Williams what he would do if he knew who done it. Williams said

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I would bring them to justice. Curtis said, by God, Dunn, he belongs to the strong party. Dunn said yes, we must look out. Lucas and Broadus then commenced quarrelling with Williams, who said he had never had a quarrel with any man, and he hoped he never should, although he was no better to receive a load of shot than any body else. Dunn remarked, you had better take care or you may catch one before you are ready for it. While they were quarrelling, Williams appeared to wish friendship, said he was going up to Askew's for some honey, bid good day, and started up the road; that soon after Williams started, Broadus took his gun and started in the same direction. Witness was standing in the back porch, and Broadus looking round, saw her, stopped, and came to the house, passed through the porch, and beckoned to Lucas; when Lucas took Dunn's gun and started. The gun was at the door of the bar-room, and Dunn was sitting on the counter in the bar-room, with his face towards the door, where he could see Lucas take the gun. That Broadus and Lucas both followed in the direction Williams had gone, and after going some distance from the house, both started and run: soon after which witness heard a gun fire, and said to Dunn they are killing that man. Dunn said no, they are only trying their guns. In five or six minutes, witness heard another gun, and again said to Dunn, they are certainly killing that man. He again said no, they are only trying their guns, to let him know what they would do, if he did not leave the neighborhood. Curtis said to Dunn, while Broadus and Lucas were absent, after they left the house, well, they have shot twice whether they have done any thing or not. Dunn made no reply. Broadus had a rifle, Lucas a shot gun, they both returned in a short time to Dunn's house, and Broadus came dancing around witness on the porch, and asked if she thought he would kill a man. She replied yes, she believed he had done it. He said no he had not, and would not. That after Broadus and Lucas returned they all went into the room and locked the door; witness went to go in and found the door locked, and Dunn's wife said she could not come in then. After they come out of the room witness's father came to Dunn's, and Broadus commenced quarrelling with him, and he and Dunn had some quarrelling also, when her father told her to get ready and go home with him when she gathered up her clothes, &c., and got

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ready to start home. As she was about leaving, Dunn came to her on the porch, and said, Elizabeth, if ever you tell of what you have seen and heard here this day, I will hear of it, and it will not be well for you. On the way to her father's she saw in the road a paper wadding, fresh from the gun, where they had shot Williams; when about half a mile above Dunn's, and near Mr. Pledgers, they saw Williams lying on the bank of the river, moaning, and the persons around him said he was shot; when cross-examined, she said Dunn did not quarrel with Williams, but Broadus and Lucas did. That Williams had been at the house two or three times before, but she never heard Dunn make any threats against him. At this stage of the examination the prosecution asked the witness to state what she knew about the shooting of the Dutchman, (Christian Earnest,) which had taken place some days before. The prisoner objected to her answering or stating any thing in relation thereto, but his objections were overruled by the court, and the witness permitted to proceed, when she testified as follows: one evening Dunn had been down to a sunk boat, and was returning in his skiff about dark when he met Broadus and Lucas going down, got out of his skiff, and went back with them in theirs. Same night Dunn returned at one o'clock; asked his wife when he got in bed where witness was. His wife answered she was in the other bed, in the room, but that she was asleep, that she (his wife,) had called witness, and she did not answer. Dunn then told his wife that they had shot Dutch, meaning (Christian Earnest,) but they had not killed him, that Dutch was picking up wood when he was shot, and that he run, and hallooed to some one in the house, boys I am shot, but not bad hurt, or killed yet. Dunn said that the damned fool when he shot had run and left his hat. She told no person of these transactions until she went home, when she told her father and mother; and afterwards, when she went to live at Mr. Swearingen's she told him.

That testimony of the persons guilt, or participation in the commission of a crime, or felony, wholly unconnected with that for which he is put upon his trial, cannot, as a general rule, be admitted, is unquestionably true; but in cases where the *scienter* or the *quo animo*, is requisite to, and constitutes a necessary and essential part of the crime with which the prisoner is charged, and proof of such guilty know-

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ledge, or malicious intention, is indispensable to establish his guilt, in regard to the transaction in question, as in cases of forgery, murder, and the like; testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, is competent legal testimony to go to the jury, notwithstanding they may constitute in law a distinct crime. Thus, upon an indictment for murder, former grudges and antecedent menaces may be proved to show the prisoner's motive against the deceased. 1 *Phil. Ev.* 169; *Ros. on Ev.* 71. Testimony however of a distinct murder, committed by the prisoner at a different time, or of some other felony, or transaction committed upon, or against a different person, and at a different time, in which the prisoner participated, cannot be admitted until proof has been given establishing or tending to establish the offence with which he is charged, and showing some connection between the different transactions; or such defects or circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by some circumstances connected with, the former, in which case, such circumstances, connected with the former, as are calculated to show the *quo animo*, or motive by which the prisoner was actuated, or influenced, in regard to the subsequent transaction, are competent and legitimate testimony.

In the case before us, no upright mind possessed of rational powers, can hear and contemplate the facts and circumstances detailed in testimony by the witness, before she was asked to state what she knew about the shooting of Earnest, without perceiving at a single glance that the death of Williams may have been, and most probably was induced by the interest he had manifested, to ferret out and bring to justice those who had attempted the assassination of Earnest. And that it was prompted by the desire on their part to shield themselves from the consequences of a prosecution therefor, by the destruction of one who had manifested a disposition to acquire information and knowledge as to the perpetrators of that crime, and expressed his determination to bring them to justice, if he knew who they were, must be obvious to every capacity, nor does it require more discrimination to discover the tendency and probable consequences of the acts and conduct of Dunn towards Williams. On the same day, and but

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a short time previous to his murder, consummated at once by the catastrophe itself and confirmed as well by his conduct during the absence of Broadus and Lucas as upon and after their return to his house. And, therefore, testimony of Dunn's participation in the attempted assassination of Earnest was material and legitimate to show the motive by which he was influenced in his conduct towards Williams, and fix upon him the charge of deliberate malice and settled hate towards the deceased, by showing such facts, as in the ordinary course of human events would seldom, if ever, fail to produce that state of feeling in the mind of the culprit, towards one whose determination to bring him to justice was known to and feared by him, and for this purpose the enquiry was proper, and the testimony elicited by it competent, as tending directly to establish a matter in issue constituting an essential ingredient in the crime charged in the indictment against Dunn, and therefore the court did not err in permitting the declarations of Dunn, as to his participation in the attempt to assassinate Earnest, to go to the jury as testimony in the case.

After the testimony, as above stated, had been given, another witness was called on the part of the prosecution, who proved that in January, 1839, he was at work in his field and heard the report of a gun, and soon after a second report of a gun, and heard some body cry murder, but he paid no attention to it until Mr. Pledger, who lives near to him, sent for him to go and see a man who had been shot, when he went with Mr. Pledger down the bank of the river, where they found John Williams lying in Pledger's boat, moaning and making a great noise, and saying he was shot, but witness supposed he was drunk until they raised him up and saw the bullet holes and blood in his clothes. He complained of being sick, and asked for water, which they gave him, and laid him down on the ground. He said he wanted to go down to Mr. Dodge's, who lived below Mr. Dunn's, and he would give \$150 to any one who would take him there in a boat, which no one appeared willing to do, and they all went up on top of the bank, and Williams crawled up, untied the canoe, got into it, and crossed the Mississippi river to a sand bar on the opposite side, which was the last he saw of him until he was taken up to be examined by the inquest several days after; when

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they were standing on the bank, Mr. Sprague and his daughter Elizabeth Sprague came along. When Williams' body was taken up there were two bullet holes in his back; one of them had ranged forward through the bowels and lodged against the skin, where it was cut out at the time the inquest was held, and he believes his death was occasioned by the wounds inflicted. He was not acquainted with Williams, never having seen him until after he was shot. Upon cross-examination he stated that Sprague and daughter passed by a short time after the guns were fired the precise time he could not tell, but supposed twenty or thirty minutes, the defendant then asked the witness to state whether Williams did not say when he went to him that he was shot by mistake, to which he replied he did say so, but the prosecution objected to the question, and the court directed the jury that it was not evidence, it not having been made to appear that the deceased apprehended that he was dying, or would die.

Another witness was then introduced on the part of the prosecution who testified to the same facts as the last, and was asked the same question as to Williams' declaration, how he had been shot, which was objected to by the prosecution, and the objection sustained by the court, and upon this state of the evidence the appellant insists that the declaration of Williams that he was shot by mistake was competent testimony, and the court erred in excluding it from the jury as deposed by the witness, and also in refusing to suffer the last witness to testify as to that fact, and state the declaration of Williams as to his having been shot by mistake.

The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, appears to us to be that they were made at a time when, in the mind of the deceased, all expectation of recovery was yielded up, and supplanted by the conviction that he would certainly die by reason of the injury received, and under which he then languished when, in the language of Chief Baron *Eyre*, in *Woodcock's case*, 1 *Leach*, 502, "every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating an obligation equal to that which is

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imposed by an oath administered in court;" and therefore to warrant their admission it must be shown in the first place that the declaration was made under an apprehension of impending death. And this may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension; nor is it essential that the party should apprehend immediate dissolution. It is sufficient if he apprehends it to be impending and certain; and this is always a question for the court to determine upon consideration of all the surrounding circumstances. 2 *Starkie Ev.* 460; *Roscoe Crim. Ev.* 25. Having thus ascertained the governing principle, and also attentively considered all the circumstances in testimony, when the court excluded and refused to admit the declarations of Williams as testimony in the case as above stated, we are clearly of the opinion that there is nothing in the circumstances, as detailed by the witnesses, tending to prove that the mind of Williams was impressed with the conviction that his wounds were mortal, and he could not survive them, or recover from the injury thereby inflicted on him. He said he was shot, and moaned and made a great noise, complained of being sick, and asked for water, expressed a desire to go down to Mr. Dodge's, and offered \$150 to any one who would take him there in a boat; but afterwards untied the canoe, got into it, and crossed the Mississippi river to a sand bar on the opposite side. No examination of his wounds was made, nor was any intimation of his opinion as to their magnitude and probable effect given by the deceased, whose strength was not exhausted, though his wishes were disregarded. And when apparently abandoned to his fate, we find him escaping from the scene of violence and outrage to the desolate sand beach on the opposite side of the Mississippi, as if from fear of those around him, he sought refuge and security for his life by placing that great water between himself and the danger he apprehended of further injury from those who sought his destruction, while nothing transpired on his part calculated to evince the consciousness of his certain danger, or inevitable death from the injury which he had already suffered, and therefore the court, in excluding testimony of his declarations as to the circumstances of his being shot, did not err, but under the circumstances the testimony was properly rejected.

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The record shows that the attorney for the State offered in evidence the affidavit of the appellant Dunn, taken before the Coroner at the inquest held by him over the body of Williams, which was objected to, when the attorney for the State introduced the Coroner as a witness to prove the statements made by Dunn at the inquest aforesaid, and the witness not recollecting them, was suffered to refer to said affidavit to refresh his memory, to which Dunn objected, and his objections being overruled he excepted to the opinions and decisions of the court in overruling his objections, and admitting oral testimony of the facts, deposed to and statements made by him, on oath, before the Coroner, at the inquest held by him over the body of Williams, which had been reduced to writing and subscribed by him, and attested by the Coroner, as well as the opinion of the court, allowing said witness to refer to said affidavit to refresh his memory as to the facts therein deposed to, and stated on oath by Dunn, the whole of which, as well as the oral testimony of the witness given on the trial is set forth in the bill of exceptions, but it is deemed unnecessary to state them here, as the question does not depend upon the facts exhibited by both, or either of them.

It is a general principle of evidence that secondary and inferior evidence, when it is attempted to be substituted for evidence of a higher and superior nature, must be rejected, the law requiring the best evidence to be adduced which the case admits of. And it is a universal rule that the contents of a writing cannot be proved by a copy, still less by mere oral evidence if the writing itself be in existence and attainable, and it is a general and most inflexible rule that oral evidence cannot be substituted for a written document, which, by authority of law, or by private compact, is constituted the authentic and appropriate instrument of evidence. 1 *Stark. Ev.* 102, 309, 394. By the law in force in this State, when the inquest was held over the body of Williams, it was, amongst other things, made the duty of the Coroner to charge the jurors "to inquire of the persons, who, if any, were present, the finder of the body, his or her relations and neighbors, whether he or she was killed in the same place where the body was found, and if elsewhere, by whom, and how the body was brought thence." It was his duty also to administer an oath or affirma-

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tion to the witnesses, and their evidence was required to be taken down in writing and subscribed by them, and returned by him, with the inquisition, to the next Circuit Court, to be holden within the county. It is therefore very clear to our minds that the deposition of Dunn, taken before the Coroner, reduced to writing, and subscribed by the deponent, and attested by the Coroner, at the inquest held by him over the body of Williams, and by him subsequently returned to the Circuit Court, with the inquest, is a written document, which, by authority of law, is constituted the authentic and appropriate instrument of evidence, of what the witness then stated, and the deposition itself being in existence, and attainable, being then in court, in the hands of the attorney for the State, and oral evidence of the contents thereof, could not legally be admitted on the part of the prosecution. Besides which, the 67th section of chapter 45 of the Revised Statutes of this State, in force at the time of this trial, declares that "in all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence." *Rev. Stat. Ark.* 296. In this case Dunn, if guilty at all, as charged in the indictment, must have been concerned with Broadus and Lucas in the murder of Williams, and his deposition in question was given by him as a witness in relation to the very crime with which he is now charged as accessory before the fact, and for which he is prosecuted in this case, and therefore the statute expressly forbids his testimony, given at the Coroner's inquest, being used against him, and therefore neither the deposition itself, or parol testimony of its contents, or of what he then stated in testimony before the Coroner, can now be legally admitted as evidence against him, in any prosecution for the murder of Williams, or as accessory thereto.

Hitherto we have considered such objections only as were presented by the appellant, and so far regarded and treated the proceedings which appear to have taken place in relation to this prosecution, subsequent to the indictment, as the judicial acts and proceedings of a legally constituted judicial tribunal, clothed with competent judicial

powers to determine the matter, but the 223d section of chapter 45 of the Revised Statutes of this State, page 316, declares that no assignment of errors, or joinder thereto, shall be necessary upon an appeal or writ of error in criminal cases, issued or taken pursuant to this act, but the court shall proceed on the return thereof without delay, and render judgment upon the record before them, whereby it becomes the duty of this court, in such cases, to consider the whole record, and render such judgment thereupon as may appear to be authorized by law. In the performance of this duty the court, upon examination of the record before them, in this case, conceived that other questions than those presented by the appellant might, and probably would, arise in the decision of the case, two of the most important of which were suggested to the counsel concerned, and argued at the bar: one of which, as was anticipated, we consider it our duty to decide; that is, as to the effect of the omission to set forth on the record an order of the Judge for the organization and holding of a special term of the Circuit Court, pursuant to the provisions of the 29th section of chapter 43 of the Revised Statutes of this State, page 233, which provides that "the Judge of any Circuit Court may at any time hold a special term for the trial of persons confined in jail, by making out a written order to that effect, and transmitting it to the Clerk, who shall enter the same on the records of the court." It is a general rule that every statute, where it is practicable, must be so construed that every part and provision contained in it may have some operation. And another rule is, that all laws which relate to the same subject, must be taken to be one system, and construed consistently. We are therefore not to look alone to the section above quoted to ascertain the object of the Legislature in authorizing special terms of the Circuit Court to be held under the particular circumstances therein mentioned, and here we may be permitted to remark that it has been, as we conceive, correctly decided by the Supreme Court of the United States, that all courts, unless restrained by some statutory provision, have a right of adjourning their settings to a distant day, and the proceedings had at the adjourned session will be considered as the proceedings of the term so adjourned. *Mechanics' Bank of Alexandria vs. Withers*, 5 Peters' Cond. Rep. 22. In the present case, how-

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ever, it appears affirmatively by the record before us, that the proceedings against the appellant subsequent to the return of the indictment by the grand jury at the May term of the Phillips Circuit Court, A. D. 1839, were not taken at an adjourned session of said court, and that they are no part of the proceedings of that court at said term, because they are expressly stated in the record to have taken place, "at a special term of the Circuit Court, began and held at Helena, within and for the county of Phillips, in the State of Arkansas, on the 12th day of August, A. D. 1839, before the Hon. John C. P. Tolle-son, Judge," which repels every presumption that they are a part of the proceedings of said court at the preceding, or any other regular term thereof, and presents the naked question, whether from the facts appearing in the record they can be regarded as the judicial acts and proceedings of a legally constituted judicial tribunal.

By the first section of the sixth article of the constitution it is ordained that the judicial power of this State shall be vested "in one Supreme Court, in Circuit Courts, in County Courts, and in Justices of the Peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in Corporation Courts; and when they deem it expedient may establish Courts of Chancery." And the third section of the same article vests in the Circuit Court "exclusive original jurisdiction of all crimes amounting to felony at the common law: and requires that the Circuit Court hold its terms at such place, in each county, as may be by law directed." By these fundamental provisions the Circuit Court, as contra-distinguished from the Judge, has unalterably the exclusive original judicial cognizance of all crimes amounting to felony at the common law, but it is left to the Legislature to prescribe by law the times, as well as the place in each county, when and where the terms thereof shall be held, and it is deemed worthy of observation, that no judicial power whatever is conferred by the Constitution upon the Judge, as contra-distinguished from the court, unless he can derive it from the power with which he is clothed as a conservator of the peace within the circuit for which he shall have been elected, or may possess the power of adjudicating certain cases upon writs of habeas corpus, by virtue of that clause in the declaration of rights, in the Constitution, which prohibits any suspension

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of the privilege of the writ of habeas corpus, unless where, in cases of rebellion or invasion, the public safety may require it; and it will be found upon investigation of the subject that there is no other instance in which he is possessed of, or can in his character of Judge separated and contra-distinguished from the court, exercise judicial power, the whole of which, except it is otherwise expressly delegated to some other authority or tribunal by the Constitution, is conferred upon and must remain the courts, and Justices of the Peace. The common law defines a court to be a "place where justice is judicially administered," and therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place, must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the State may be there exercised by the Judge or person authorized by law to hold it; and if the law prescribed no time for holding the court, the Judge might lawfully hold it when, and as often, as he chose. So, likewise, if the place was left to his election, instead of being fixed and prescribed by law, he might lawfully set in judgment, where he pleased, within the territorial limits prescribed to his jurisdiction, but in this State both the time and place of holding the terms of the Circuit Court in each county, are prescribed by law, and in many counties the duration of the terms limited to a single week; in some the court is required to continue in session until the business before it is disposed of; but under particular circumstances, and subject to certain limitations prescribed by the statute, a special term of any Circuit Court may be held "for the trial of persons confined in jail," or, according to the provisions of the 28th section of the 43d chapter of the Revised Statutes, page 233, "special adjourned sessions of any court may be held in continuation of the regular term upon its being so ordered by the court or Judge in term time, and entered by the Clerk on the record of the court;" and in either case it is essential that the order be entered on the records of the court, though the necessity for such record is more forcibly seen, if not more imperatively required, in the former than it is in the latter; because, when the time and place are prescribed by law, as they are for holding the regular terms by a general law of which every person is cognizant, all whom duty binds,

or interest prompts, to be there present, know the time and place, when and where, their obligation is to be performed, or their rights, if they be suitors, adjudicated; and such persons are for most purposes presumed to be present during the term whatever may be its duration, but when the regular term has expired or determined by operation of law, or by an adjournment to the next succeeding regular term thereof, all business therein, not otherwise disposed of, is continued by operation of law, to the next regular term, and cannot, except in the particular cases specially provided for by the 29th section of the statute above quoted, be adjudicated prior to the term to which they were continued, and those concerned are under no legal obligation to be prepared therefor at a previous day; and furthermore in regard to the regular terms, nothing is dependent upon facts to be made out and recorded, to authorize their being held, as must be the case in regard to special terms ordered by the Judge and the provisions of the statute. We simply look to the law and there discover the time and place, and then turn to the record and ascertain that the Judge authorized to hold the court was then and there present, and recognize in this union and combination of circumstances a court legally constituted and vested with judicial power; the adjudications of which must be regarded as judicial. Such however is not the case in regard to a special term, the authority to hold which depends upon the following facts and circumstances. 1st. That some person is confined in jail who may be lawfully tried by that court upon some criminal charge. 2d. That it shall not interfere with any other court to be held by the same Judge. 3d. That it shall not be held within twenty days of the regular term of such court. 4th. That an order therefor, as required by the statute, be made out by the Judge, and by him transmitted to the Clerk; and 5th. That the same be entered on the records of the court. These circumstances are considered essential to the legal appointment, constitution, and organization, of a special term of the Circuit Court, because it is a special authority conferred upon the Judge to accomplish a specific and specified purpose contrary to the general and regular course of proceeding prescribed by law, and therefore being a special power, every circumstance necessary to its exercise must exist and be made to appear of record, otherwise the

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power cannot appear to have been legally exercised, and the most important circumstance upon which the right of power of the Judge to order a special term of the Circuit Court is made to depend, cannot judicially appear otherwise than by being made of record, it being a matter altogether *in pais*, and if the law does not require such fact to be made of record, the statutory provisions designating a time for holding the courts is nugatory, and the Judge may, notwithstanding, hold the court as well at any other time, and proceedings thereat will have to be regarded as judicial and warranted by law, but no such construction of the several statutory provisions under consideration is, in our opinion, justifiable, because it would defeat the whole object of their enactment, and leave in the Judge a discretion of which the Legislature obviously designed to divest him. By authorizing special terms to be held for the trial of persons confined in jail, the Legislature intended to expedite the administration of justice in that class of cases only where the party to be tried is deprived of his liberty, and the power of the court, when properly organized, is limited to them, and cannot, in our opinion, under the provisions of this statute, be legally exercised over any person not confined in jail when the order was made, which must be at least ten days previous to the commencement of the term. Otherwise, the provisions of the 30th and 31st sections of the 43d chapter of the Revised Statutes, cannot be complied with, which, although they are only directory to the Judge, serve to explain and illustrate the design of the 29th section before quoted. The former requires the Judge, in his order for a special term, to issue a *venire facias* to the Sheriff, requiring him to summon a grand jury to attend such special term, if any person shall be confined in jail who may not have been indicted. And the latter requires the Judge ordering such special term, when the same shall be ordered under the provisions above quoted, to "cause a notice thereof to be served on the attorney for the State prosecuting for such Circuit, ten days before the commencement of such special term." We are therefore satisfied that the order for the special term must be made at least ten days before the commencement of the term, and designate the persons to be there tried, and state that they are confined in jail, and whether they have been indicted, previously or

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otherwise, and if they, or either of them, have not been indicted for the offence for which he is to be there tried, the order must contain a direction to the Clerk to issue a *venire facias* to the Sheriff, requiring him to summon a grand jury to attend such special term of the court, which order must, according to the express requisition of the law, be transmitted to the Clerk, and be by him entered on the records of the court, when, if the time mentioned in the order for the special term be such as not to interfere with any other court to be held by the same Judge, nor "within twenty days of the regular term of such court," so that it does not come within the prohibition of the 33d or 34th sections of chapter 43 of the Revised Statutes, page 234, every requisition of the law authorizing such special term having been observed and complied with, if the record shows in addition thereto that the Judge authorized by law to hold such court was present at the time mentioned in the order for such special term at the place prescribed by law for holding such court, the court will be legally constituted; and in regard to such persons as are confined in jail and designated in the Judge's order, may legally exercise the judicial power vested in it by the Constitution, and its adjudications in such cases will possess the force and obligation of judicial acts and judicial authority, because the record and the law furnish conclusive testimony that there was a court legally organized and competent to determine the matter judicially. If these positions be not true, how are the extra-judicial acts of a Judge, if he shall assume the power of holding a special term of the Circuit Court without any order whatever appointing a time thereof, or any notice to the attorney for the State, or the persons to be tried thereat, to be distinguished from the judicial proceedings of the court? No one, we will presume, would undertake to justify such assumption of power by the Judge, and yet if the facts and circumstances, the existence and concurrence, of which are under the statute indispensable to the authority of the Judge to order or hold such special term, may be omitted in the order therefor, or need not be set forth in the record of the court. There can be no means of distinguishing the one from the other, and such acts of the Judge as are clearly unauthorized, and unquestionably void, would nevertheless carry with them and bear upon their face incontrovertible testimony that

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they were the acts and proceedings of a legally constituted court, which is contrary to every principle of law and justice; besides which if such construction could be indulged, it would place it in the power of the Judge, if one could be found profligate and reckless enough for the purpose, to shield the guilty from merited punishment, or jeopardize the liberty or life of the innocent by holding a special term of the court without previous notice, or any opportunity for preparation to the one party or the other, as his prejudices, sympathies, or interest, might induce him to desire the conviction or acquittal, preservation or destruction, of the accused, and although we are fully assured that no such advantage was given to either party in the case before us, and we do not in the slightest degree censure or impugn the motives of the Judge before whom the proceedings were had in this case; for we doubt not he acted throughout the whole course of the proceeding in an upright and impartial manner, and as he conceived, legally, in the discharge of a solemn and important duty; yet it is very clear to our minds that the law under consideration was never designed to confer such power upon any Judge as would enable him in that manner to sport with public justice, and that any interpretation thereof, which would admit the existence of such power in any Judge, cannot be just; and, therefore, as such facts and circumstances, as are indispensably necessary to have existed in combination, before the Judge could legally order a special term, or a special term of the Circuit Court could be held, do not, from the record before us appear to have existed, when the proceedings in this case subsequent to the indictment, and issuing of the *capias ad respondendum*, took place, they must be considered as proceedings before the Judge simply, as contra-distinguished from the court, and cannot be regarded as the judicial proceedings and adjudication of the Circuit Court of Phillips county upon the charge preferred by the indictment against Dunn; and they are, therefore, in the opinion of this court, *coram non jure* and void, which being the case, the life of Dunn cannot be considered as having been within the contemplation of law put in jeopardy thereby, and therefore there is no necessity for us to decide in this case any thing as to the effect and operation of the provision in the Constitution of this State, as well as the United States, that "no person shall for the

same offence be twice put in jeopardy of life or limb," as he may yet be lawfully tried precisely as if no such proceeding had ever taken place before the Judge.

And this imposes upon us the necessity of inquiring into and ascertaining whether this is, under the circumstances, a case within the appellate jurisdiction of this court, under the Constitution and the laws restricting and regulating the right of appeal to this court.

In the second section of the sixth article of the Constitution it is, amongst other things, ordained that "the Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State under such restrictions and regulations as may from time to time be prescribed by law." This fundamental law, so far as it relates to the present question, does not, in any respect, differ materially from that clause in the Constitution of the United States, which declares that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make;" in commenting upon which, and defining the meaning of the terms "appellate jurisdiction," as there used, Judge *Story*, in the third volume of his *Commentaries on the Constitution*, page 626, says "the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause in reference to judicial tribunals: an appellate jurisdiction, therefore, necessarily implies that the subject matter has been already instituted in, and acted upon, by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and, indeed, in any form which the Legislature may choose to prescribe, but still the substance must exist before the form can be applied to it."

To operate at all then, under the Constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States. It must be by one clothed with judicial authority and acting in a judicial capacity. And it is upon this principle that the Supreme Court of the United States, in the case of *Marbury vs. Madison*, reported 1 *Cranch*, 175, and 1 *Peters' Cond. Rep.* 267, refused to entertain jurisdiction of that case, which was an

application for a writ of *mandamus* to the Secretary of State of the United States, directing him to deliver to Marbury his commission as Justice of the Peace for the county of Washington, in the District of Columbia, and decided that it was neither a case within the appellate or original jurisdiction of the Supreme Court, as unalterably defined and prescribed by the Constitution; and held so much of the act of Congress to establish the judicial courts of the United States as purported to authorize the Supreme Court "to issue writs of *mandamus* in cases warranted by the principles and usages of law," to any person holding office under the "authority of the United States," other than the judicial courts of the United States, to be repugnant to the Constitution, and therefore void, and the principle upon which this decision was made has never, within our knowledge, been, and, in our opinion, never can be, successfully controverted.

And, in our opinion, the same language, as it is used in that clause of the Constitution of this State, now under consideration, must receive the same construction, and have the like application given to it as has been given thereto, and used in the Constitution of the U. States; for they are used in reference to the same object, that is, to define in part the jurisdiction of the Supreme Court, and were adopted by those who framed the Constitution of this State, with a full understanding of their application, as ascertained and defined by the adjudications and commentaries aforesaid; and, therefore, it is reasonable to presume that they were not designed to include any thing more than they are understood and held to embrace by the construction which they had previously received; and it is, therefore, to our minds, manifest that the appellate jurisdiction of this court does not, and under the Constitution can never be made to extend to the proceedings or decision of any officer or tribunal whatever, other than the judicial proceedings or determinations of some court or Justice of the Peace vested with some portion of judicial power by or under the authority of the Constitution itself; and as we have already determined that the proceedings which from the record before us appear to have taken place subsequent to the indictment being returned at the regular term of the Circuit Court, in May 1839, must be considered as proceedings before, and decisions of, the Judge simply, and not of the court,

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and that they are *coram non judice*. It follows, as a necessary consequence, that the Superior Court has not appellate jurisdiction of the case, wherefore the same ought to be, and hereby is, dismissed from this court. But from the proceedings which appear by the record before us to have taken place before the Judge of the Circuit Court of Phillips county, in relation to the crime with which the appellant stands charged by the indictment returned into said Circuit Court, and still pending therein against him for adjudication, we consider it our duty to exercise the authority vested in the Supreme Court by the Constitution, by suspending absolutely all of the proceedings in this cause had before the Judge of the Circuit Court of Phillips county aforesaid, since the adjournment or expiration of the regular term of said court, which commenced on the first Monday of May, A. D. 1839, as the same appear to have taken place improvidently, irregularly, and illegally, and to have been entered on the records of said court as parcel of the judicial proceedings thereof, and the Clerk of this court is hereby directed and required to issue a writ of superseas, without delay, to the Judge of said Circuit Court, and the Sheriff of said county of Phillips, commanding them, and each of them, to supersede and desist absolutely and for ever from further proceeding in the execution of the said extra-judicial sentence of death pronounced against the said Hiram Dunn, which appears by the record before us to have been entered on the record of said Circuit Court on the 17th day of August, A. D. 1839.

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THE STATE against WILLIAM W. STEVENSON.

ON QUO WARRANTO.

Matters of fact set up in any pleading are upon demurrer regarded as admitted to be true ; and the simple question presented is, as to their legal sufficiency.

But it is facts only, and not inferences or deductions of the pleader, that are to be taken as true ; and such inferences or deductions, though improvidently or needlessly and improperly stated, are to be altogether disregarded as irrelevant and impertinent.

And an allegation that a particular law was in force at a particular time, is within this rule ; and is not a fact, the truth whereof is admitted by demurrer.

The statute approved March 3rd, 1838, concerning the office of Commissioner of Public Buildings, was not in force from and after its passage. Like other acts passed at that session, it did not take effect until the proclamation of the Governor.

This was a writ of *quo warranto*, sued out and prosecuted by the attorney for the State in the Supreme Court, by which the defendant was commanded to appear and answer unto the State of Arkansas, and show by what warrant he exercised the franchise of Commissioner of Public Buildings of the State of Arkansas, and had entered into, and upon, and used the powers, rights, and privileges, thereunto appertaining, it being alleged that no legal or valid grant of said franchise had ever been made to said *William W. Stevenson*, by and under the authority of said State. To this mandate the defendant appeared and pleaded with a *profert* as his warrant for the exercise of said franchise, a commission issued by the Governor under the seal of State, countersigned by the Secretary of State, bearing date the 31st day of July, A. D. 1839, whereby he was in due form of law appointed and commissioned by the Governor, Commissioner of Public Buildings, "to fill the vacancy occasioned by the resignation of Samuel H. Hempstead," and authorized and empowered to hold said office during the time prescribed by law ; that he had duly qualified as such Commissioner by taking the oath of office prescribed by law, which was endorsed on said commission, and that before entering on the duties of his said office he gave bond to the State with security in the penal sum of ten thousand dollars, conditioned in the manner prescribed by law, which had been approved by the Governor.

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To this plea the State, by her Attorney, replied in substance, that she ought not, by reason of any thing by said Stevenson in his said plea alleged "to be barred from having her aforesaid writ against him, the said William W. Stevenson," because, she says, that by an act of the General Assembly of the State of Arkansas, approved March 3d, A. D. 1838, entitled, "an act providing for the appointment of Commissioner of Public Buildings," and which act was in full force from and after the said day of its approval, and thenceforward continued to be, and now is, a part of the law of the land, it was, among other things, enacted that there should be elected by the General Assembly, a Commissioner of Public Buildings, who should be commissioned by the Governor, and hold his office for the term of two years, and that the Commissioner appointed thereunder should hold the first term of his said office only until the end of the next session of the General Assembly thereafter: and that so much of an act of said General Assembly, approved the fourth day of November, A. D. 1836, as authorized the Governor to appoint a Commissioner of Public Buildings, should be, and the same was, by the act first aforesaid repealed: and the said State avers that at the next session of the General Assembly, after the passage and approval of the act first aforesaid, to wit: on the 11th day of December, A. D. 1838, the act first aforesaid being then in full force as aforesaid, at an election for Commissioner of Public Buildings aforesaid, held on said last mentioned day, in joint meeting by the two houses of the General Assembly aforesaid, under and by virtue of the act first aforesaid, in the Representative hall of the State of Arkansas, the President of the Senate and Speaker of the House of Representatives presiding, upon a joint vote of said two houses, taken in accordance with law, one *Richard C. Hawkins*, a citizen of the State of Arkansas, received a majority of all the votes so then and there given by said two houses, on joint vote, for said office of Commissioner of Public Buildings, he, the said *Richard C. Hawkins*, being then, and now, a citizen of said State, and then and thenceforward until this time, and now eligible to said office, and by law competent to hold the same, and receive, hold, have, and enjoy, all and singular the privileges, rights, and franchises, profits, salary, and emoluments, of said office; and he, the said

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Richard C. Hawkins, was taken, and then, to wit: on said eleventh day of December, A. D. 1838, in the presence of said two houses of said General Assembly, in said Representative hall of the capitol of said State, declared by said Speaker and President to be duly elected Commissioner of Public Buildings of the State of Arkansas; and he, the said Richard C. Hawkins, then and there in manner aforesaid, was duly elected such Commissioner of Public Buildings for the term prescribed by law, to wit: for the term of two years from said day of said election, fully, to be complete and ended on the 11th day of December, A. D. 1840.

And the said State further avers that the said office of Commissioner of Public Buildings then was, and thence hath continued to be, and still is, the same office which the said William W. Stevenson hath, as in said writ alleged, intruded into and usurped; and she further avers that on the 17th day of December, A. D. 1838, the said Speaker of the House of Representatives and President of the Senate, issued, granted, and delivered, to the said Richard C. Hawkins, their certificate, in due form of law, as such Speaker and President, of his election as aforesaid, and right to hold the office aforesaid, and which said certificate of election was, by the said Richard C. Hawkins, on the 21st day of December, A. D. 1838, transmitted to, and came to, the hands of the Governor of the State of Arkansas; and further, that on the said day and year last mentioned, the said Richard C. Hawkins, together with two good and sufficient securities, made and executed their joint and several bond, in writing, in the sum, and with the condition, required by the act first aforesaid, in due form of law, and in conformity with the requisitions of the said act first aforesaid, as the official bond of said Richard C. Hawkins; and that the said Richard C. Hawkins, on the day and year last aforesaid, transmitted to said Governor his said official bond; and thereafter, to wit: on the 27th day of December, A. D. 1838, he, the said Richard C. Hawkins, filed said bond in the office of Secretary of State of the State of Arkansas, and that the said bond hath thence continued to remain, and still doth remain, in said office of said Secretary of State; and further, the said State avers that on said 27th day of December, A. D. 1838, the said Richard C. Hawkins, did take before Jesse Brown, Esq., an act-

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ing Justice of the Peace in and for the county of Pulaski, the oath of office, by law by him required to be taken as such Commissioner, (he, the said Jesse Brown, being then and there, by law, authorized to administer the same,) and thereby accepted said office. And so the said State saith that the said Richard C. Hawkins did, on said 11th day of December, A. D. 1838, become, by the election aforesaid, Commissioner of Public Buildings for said State, for and during the full term of two years therefrom, to wit: until the 11th day of December, A. D. 1840: and thence hath continued to be, and now is in law, and by the law of the land, such Commissioner of Public Buildings, and that the said office hath not at any time since the said 11th day of December, A. D. 1838, hitherto been vacated, nor is it now vacated by said Hawkins, either by his own act, or by operation of law; and that said Hawkins hath not at any time since said 11th day of December, A. D. 1838, hitherto become, or been, nor is he now, ineligible to said office, or incompetent to hold the same; nor hath he at any time hitherto resigned, or yielded up the same, and so the said State saith, and avers it to be true, that when the said William W. Stevenson was so, as in his said plea alleged, appointed by said Governor, to the office aforesaid, to wit: on the 31st day of July, A. D. 1839, there was no vacancy existing in said office, but that the same was then in law held by said Richard C. Hawkins; and that the said appointment of the said William W. Stevenson was, when the same was so made, as in his said plea alleged, and still is, utterly null and void, and confers upon said William W. Stevenson no right or warrant to hold said office, or enjoy the rights, privileges, franchises and emoluments, thereof, and this the said State is ready to verify; wherefore, by her said attorney, she prays judgment, and that the said William W. Stevenson be ousted of the franchises aforesaid, &c.

The defendant demurred to this replication, and stated specially in his demurrer, as the ground thereof, "that it is not in the said replication alleged that the said Richard C. Hawkins, therein mentioned, ever obtained or had any commission from the Governor of the State of Arkansas to use or exercise the aforesaid office of Commissioner of Public Buildings."

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The State, by her attorney, joined in demurrer, and after argument, the matters in law arising thereupon were submitted to the court.

WATKINS & HEMPSTEAD, for the respondent:

The defendant, in his pleading, has set out a commission from the Governor of the State, under seal, bearing date, to wit: on the 31st day of July, A. D. 1839, and it is not pretended that the person in whose behalf this *quo warranto* is sued out, ever had a commission for the same office.

The Constitution establishes the judicial co-ordinate with the executive department, and also with the Legislature. That one has no jurisdiction over the other is beyond doubt, and this principle is affirmed, if it required affirmance, in the decision of the case of *Hawkins vs. the Governor*. 1 Ark. Rep.

In that case it is expressly held that the Constitution assigns to the office of Governor no ministerial acts, and that the law can impose none—that if it does, their performance cannot be compelled. This is a necessary result from the nature of the powers with which the executive is clothed, that is, they are political, and therefore must necessarily possess a political discretion, for the use and abuse of which he is responsible, not to the judiciary, but in the mode prescribed in the instrument that confers that discretion upon him.

Each department has the right of judging and construing the Constitution for itself, according to the best lights they may have on the subject respecting the peculiar powers and duties conferred upon each, and the exposition of one, touching its own duties, cannot at all bind the other departments.

The decision of the Governor upon all legal and constitutional questions is final and conclusive, so far as regards the performance of his own duties, and the same principle applies to the other two co-ordinate departments. Hence, we respectfully contend that when an individual is once commissioned by the Governor acting under the Constitution, that the judiciary cannot inquire into the right of the commissioned individual to hold the office, much less into the claim of one who has no commission at all.

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This may seem a bold position, but it is nevertheless sustained by principles deduced from the Constitution and countenanced by the decision of this court, to which reference has been made.

The Constitution in section 15, article 5, declares that "vacancies that may happen in offices, the election to which is vested in the General Assembly, shall be filled by the Governor during the recess of the General Assembly, by granting commissions which shall expire at the end of the next session."

The 13th section of the same article provides that "all commissions shall be in the name and authority of the State of Arkansas, be sealed with the seal of the State, signed by the Governor, and attested by the Secretary of State."

One section shows how and when an appointment is to be made, the other how it shall be evidenced.

The Governor determines upon this grant of power when a vacancy has happened, and makes an appointment, which is evidenced by the commission which he signs. It may readily be conceived that he may err, and that he may suppose a vacancy to exist, when, in point of fact, there is none. Yet what tribunal can gainsay his decision, or set it aside and declare that no vacancy has happened, and that the person commissioned shall not exercise the duties of the office to which he has been appointed? Each department possesses the right of judging of the Constitution for itself, and its decision is final as regards the performance of its own duties. 1 *Ark. Rep., Hawkins vs. the Governor.*

Of what utility is that right of judging if another branch of the government, equal only in power, could review the grounds upon which a decision is made, and declare that the facts necessary to support it did not exist, or that it is formed upon a mistaken apprehension of the Constitution? Can any principle be conceived more dangerous to the stability of the State government; more certain to destroy the equilibrium of power which supports and sustains the operations of each department?

The judiciary have solemnly disclaimed the exercise of any authority over the Executive. Yet what language could so forcibly speak the assumption of judicial supremacy, to gravely review, per-

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haps, for the purpose of annulling, the exercise of constitutional power by the Executive? Would not his powers be a mere mockery, if whatever he done in his political character might be rightfully annulled by a co-ordinate tribunal? In vain have his constitutional duties been defined and means extended to him to perform them, if what he performs in his executive capacity is not to be considered as matters *res adjudicata*.

Again, it is provided that each house of the General Assembly shall judge of the qualifications, returns, and elections, of its own members. *Sec. 15, Art. 4.* The right of thus judging is exclusive of every other jurisdiction. Party spirit may disregard the dictates of justice and law, and a person adjudged to be a member of either house, when it is a notorious fact, evidenced by election returns, that his opponent is the choice of the people, in whose person their most sacred privilege has been audaciously violated. Yet where is the remedy? Where can the disappointed aspirant for public honor obtain redress? Could he apply to this court for a writ of *quo warranto* against his successful adversary? If the writ was permitted to issue at all, could this court, by possibility, judge between the qualifications of the two, investigate the returns, and determine which was entitled to a seat, when the power is exclusively vested elsewhere? Would this court dare to go behind the vote of the house, as exhibited in the journal, to settle a contested claim to a seat? Would a *quo warranto* be permitted to issue when the judgment of this court could rightfully do nothing more than affirm the decision of the house, and that too, upon the vote of that house? Would this court gravely adjudicate that the person *who was voted to be the sitting member was in reality so, as appeared by the vote on the journal?*

Again, no person shall be a Senator who shall not have attained the age of thirty years, who shall not be a free white male citizen of the United States, who shall not have been an inhabitant of this State one year, and who shall not at the time of his election have an actual residence in the district he may be chosen to represent. *Sec. 6, art. 4, Const.*

What if one, or all, these qualifications should be wanting in the person chosen as Senator, where would the right of investigating and

finally deciding reside? In the judiciary? No; it is a power not granted to that department, but expressly vested in another.

Under what clause of the Constitution—by what implication is it that either the executive or judicial branch can, in the slightest degree, interfere—in the remotest impair the decision of either house, as to the qualification of members, or as to the right of one to a seat which has been contested? By what exposition is it that a court, confessedly destitute of any authority to control or determine a matter in any way, is yet invested with the tremendous power of annulling the decision made on the same matter by a competent body—a decision, in its very nature, placed beyond the reach of coercion from any quarter? If, in these analogous instances, the judiciary would not, nay, could not, interfere by direct means, or indirect agency, we triumphantly ask how it can take a single step in investigating the facts of the present case, or at all events, go behind the commission pleaded by the incumbent of the office.

Is there any difference, in principle, between this decision made by the Governor as to a vacancy followed by a commission, and one that would be made by either house of the General Assembly as to the right of members to a seat? If the latter would be final and conclusive in every particular, what reason can be urged to exempt an exercise of the appointing power, under section 15, article 5, of the Constitution, by the Governor, from the same rule?

Will this court undertake to say that a vacancy did not exist in the office; and that, therefore, the Governor had no right to appoint? Shall his decision be reviewed when it is made in the exercise of a political constitutional power, and final and conclusive—indeed, can be reviewed in no other light than as a matter *res adjudicata* in every sense of the term, expressly declared so to be, by the spirit of that instrument? And yet the court must do this if it looks beyond the evidence of right exhibited by the respondent. Where is the substantial difference between exercising authority directly and boldly over the Executive, and annulling every act which he may perform in his political capacity? In both events the constitutional power of the Executive is at an end, and his independence, as the political representative of the State, is not more effectually prostrated, when he performs the

bidding of a court, than when that court sits in judgment on his conduct, investigates whether he has properly or improperly discharged his duties, and as a finishing stroke to this solemn farcical impeachment adjudges that he has done an act which is void, illegal, and unconstitutional. His functions could not be more effectually paralyzed by direct glaring usurpation, than by a judicial nullification of what he has done. Can it be supposed for a moment that the convention ever contemplated such a state of things—such a spectacle of clashing jurisdiction and governmental disorganization? If they did, how unwise, how foolish, not to have provided some mode by which collisions between the different departments might be adjusted. If the principle is once established that the decision or action of one department on a matter which appropriately belongs to it, may be reviewed and acted upon by another, such collisions must arise pregnant with danger to the perpetuity of the compact. Such a doctrine will never be judicially sanctioned.

Moreover, it is contended that no court will ever do an idle or nugatory act, or pronounce a judgment which cannot be executed. Suppose a judgment of ouster was given against the respondent, the person claiming the office would be put as far from obtaining the evidence by which he could rightfully exercise the duties of it as he ever was—we mean a commission. The court might declare that he was duly elected, but could not commission, and the judgment could be no substitute for that necessary evidence of official right, because the Constitution has prescribed a different kind to emanate from a different source. That all elective officers, whether civil or military, except bank officers, must be commissioned by the Governor before they can act, needs no argument or illustration—to mention it is sufficient. *Sec. 13, art. 5, Const.*

It is further contended that even on the facts of the case, the individual on whose behalf the writ is taken out is not entitled to the office; because, the law under which the election for a Commissioner of Public Buildings was held in 1838, was not in force.

It is a law of a *general, public, and permanent nature, without an enforcing clause*, and could not be considered in force until the issuance of the Governor's proclamation declaring that the Revised

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Statutes were printed and ready for delivery, or by further legislation. *Rev. Code*, p. 699.

The election was held on the 11th day of December, 1838, when the only law in force vested the appointment of a Commissioner in the Governor. See act of November 4th, 1836, authorizing the sale of the five sections.

On the 13th of the same month an act to put in force an act entitled "an act providing for the appointment of Commissioner of Public Buildings, approved 3d March, 1838," was approved by the Governor, and such approval reported to the proper branch of the Legislature. This was therefore the first time that a valid election could be held for such an office. *Pamphlet Acts*, 1838, p. 95.

For the act thus put in force and improperly excluded from the Revised Statutes, see *Pamphlet Acts* of 1837, '38, p. 84; for the election, *vide House Journal* 289, 290.

On the 13th December, a resolution passed the House of Representatives declaring the election on the 11th null and void, by a vote of thirty-six to nine, which resolution was sent to the Senate, but not favorably acted on. *Vide House Journal* of 1838, p. 301.

No election was ever held afterwards, and the Legislature adjourned *sine die*. The Governor filled the vacancy in the office by appointment, as his constitutional duty required.

We are resisting a novel position—that a valid election was held under a law when there was no law!

Whatever the facts may be, we mainly rely on the principle that this court cannot step behind the commission to the respondent, that it furnishes evidence of his right to exercise the duties of the office which is now a subject of contest without hindrance or interruption from any quarter.

All of which is respectfully submitted.

PRIZE, for the State:

In arguing the demurrer two positions are assumed by the respondent's counsel.

First, he contends that inasmuch as the power is given to the Governor, in case of vacancy in such an office, to fill such a vacancy by

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appointment, this therefore is a constitutional duty imposed on the Governor in the exercise whereof it became necessary for him to decide whether a vacancy did or did not exist: and that as he has decided that question, his decision is final and conclusive, and cannot either directly or indirectly be reviewed in this court.

It is stated by the counsel that this position is not assumed with entire confidence, inasmuch as it is somewhat novel, and has never before been argued before a judicial tribunal.

It is not strange that the position assumed should lack even the pretence of confidence, for it amounts to no less than this, that the Executive is superior to all law, and that his acts, whether for good or evil, are not to be changed or examined by any tribunal whatever. It amounts to this: that if the Governor were to commission twenty individuals to different offices, in none of which existed a vacancy, these individuals must continue to exercise their respective offices, because the Executive, by commissioning them, has decided that a vacancy existed, and his decision is without appeal. It amounts to this: that if he were to-morrow to commission three men as Judges of the Supreme Court, the office of your honors would *ipso facto* cease, and you be no longer Judges. It amounts to this: that the Executive is the law, the realm, the State.

The gentleman admits, it is true, that if the Governor were to issue two commissions for the same office, to different individuals, this court could decide which was entitled to hold the office. But why make this concession? If his position be correct the Governor would equally decide in such case by issuing the second commission, that a vacancy existed as in a case where no commission had before issued, for, according to the argument, otherwise he would have had no power to issue the commission—by issuing it he decided that he had the power to issue it. *Ergo*, he decided that there was a vacancy, and his decision cannot be reviewed or reversed.

It is contended that the decision of the Governor upon all legal and constitutional questions is final, and conclusive, so far as regards the performance of his own duties: and hence it is contended that when an individual is once commissioned by the Governor, the judiciary cannot inquire into his right to hold the office. This the counsel

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admits is a bold position, but he holds it to be sustained as well by principles deduced from the Constitution as from the decision of this court in *Hawkins vs. the Governor*. 1 Ark. Rep. 570.

That decision declares that each department possesses the right of judging the Constitution for itself, and that its decision is final as regards the performance of its own duties. From this he contends that where one department, say the executive, has decided a constitutional question, for another to review the grounds on which his decision was made, and declare that the facts necessary to support it do not exist, or that it is formed upon a mistaken apprehension of the Constitution, would be dangerous to the stability of the government, and destroy that equilibrium of power which supports and sustains the operations of each department. And then it is asked what language could so forcibly speak the assumption of judicial supremacy, as to gravely review perhaps for the purpose of annulling the exercise of constitutional power by the Executive? His powers, it is said, would be a mere mockery if whatever he did in his political character, could be annulled by a co-ordinate tribunal, and his constitutional duties have in vain been defined, and means extended to him to perform them, if what he performs in his executive capacity is not to be considered as *res judicata*, and as this court has declared that all his acts are political, whatever he does is irreversible and infallible.

If the opinion given by this court, in the case referred to, warranted these conclusions, God shield the State. If this argument be worth any thing, if it be any thing better than mere declamation, it goes to this extent, that when a Governor signs a law he declares it to be constitutional, because else, he would not have signed it; and, therefore, this being *res judicata*, this tribunal cannot declare it unconstitutional: that if the Governor were to-morrow to commission three individuals as Judges of the Supreme Court, he, by that act, declares your honors' seat to be vacant, and it is *res judicata*, not to be traversed or denied; that he can at any moment turn out every officer, military and civil, ministerial and judicial, merely by issuing new commissions, because he thereby decides those offices to be vacant, and it is *res judicata*. Oh, potent word! but potent only for the Executive. For although it is admitted that the Executive stands on the same ground

with the Legislature, yet no apostle of this new creed has ever reflected that if the position be true, the Executive ought not to veto an act of the Legislature, because, by passing the act, they decide it to be constitutional, and it is *res judicata*. Nay, in this very case, when the Legislature elected the individual mentioned in the replication, and thereby declared the law providing for his election to be in force, it was *res judicata* according to the argument, and yet the Governor attempted to annul it by refusing the commission.

Into such and innumerable other absurdities would the position assumed conduct us. If it be true then, there is no Constitution, nor any settled rule of decision, but the department which first decides makes the law, and its fiat is irrevocable. It is manifest that the most glaring and monstrous absurdity would result, and the whole position is nothing but a hideous deformity embodied, unless it be at once allowed that the Executive is supreme, and when that department decides its decision is final, but that the same rule does not hold in regard to the other departments. For if you carry it out and apply it to each other department, inextricable confusion results, the government ceases to be a unity, and the first department which acts does all and leaves nothing for the others to do. Even their concurrence becomes unnecessary. The counsel contends that there is no difference between exercising authority directly and boldly over the Executive, and annulling an act which he may perform in his executive capacity, and that his functions could not be more effectually paralyzed by direct glaring usurpation than by a judicial nullification of what he has done. That is to say, by the same process of words, for it cannot be called an argument, this court would do precisely the same act by declaring a law unconstitutional as they would if they were to send their mandate to the Governor, ordering him not to sign it. The Governor would do the same act by vetoing a law as though he were to forbid the Legislature to pass it: and precisely the same act by refusing to commission a defaulter, as though he had forbidden the General Assembly to elect him.

Let this court speak for itself, and say whether this strange and novel doctrine has been uttered by the supreme tribunal. "The Constitution," said this court, is above all the departments of the go-

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verment, for it creates and preserves them." "The writ asked for" said this court again, in the case of Hawkins, "does not proceed upon the ground that the Governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. *In the first case the court certainly has jurisdiction*, and in the *last* they unquestionably have not;" and again, "if he does an unconstitutional act, the judiciary can annul it and thereby assert and maintain the vested rights of the citizen."

This is intelligible language, and not the jargon and babble of confusion. It has a definite meaning easy to be ascertained, and when ascertained, consonant with reason and sound political doctrine. This court cannot compel the Governor, or the Legislature, to do any political act, because each department is invested with ample discretion to do, or leave undone, any such act, and with that discretion no other tribunal or department can interfere to coerce the action of the coordinate department. But when the discretion has been exercised, and the act done, if that act is brought in question before this court, or any other judicial tribunal, and the legality or constitutionality of the act presented to it for decision, then it is "of the very essence" of judicial duty and power to decide what the law is, and what the Constitution is; and if the act be void this court is bound by its oath of office to declare it so. The Executive has the right to decide for himself as to such matters, and this court cannot by its mandate compel him to decide at all, much less to decide against his own convictions; but when he has decided, his decision is liable to be reviewed here, and reversed if erroneous, and individual rights depend upon it; any other doctrine would be monstrous in its absurdity.

When before, for the last twenty years, has it been contended that the judiciary cannot annul the action of *both* the other departments, if unconstitutional? When, before this, was it ever argued that where an Executive commissioned a person to an office, a court of justice could not inquire whether that person was in law entitled to it?

The Governor, says the counsel, decides that there is a vacancy before he commissions. So, by the same argument, the Governor de-

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cides that every person whom he commissions is legally elected and eligible to the office to which he commissions him, and therefore a *quo warranto* lies in no case where the omnipotent Governor has granted a commission.

He has, however, produced one instance in which this court could not interfere, and but one, and that is in case of the exercise by either house of the Legislature of the power to judge of the qualifications and returns of its own members. That, however, is an exclusive judicial power, conferred by the Constitution itself upon each House, and from which no appeal is granted. It is judicial in its nature, and exclusive: like the power of impeachment, and the judicial power imparted by the Constitution to the Senate for the purpose of trying impeachments.

But, in the matter of issuing commissions, no such exclusive power is given by the Constitution, nor does the right to any office depend upon the Governor's commission, but it is the duty of the Governor upon the election of any person to office to grant the commission.

The simplest answer, however, to the whole argument is, that although intended to be in support of, it is directly against the demurrer: for, if it is good for any thing, it proves just this position, that as the Legislature elected Hawkins, they thereby decided that the law creating the office was in force, and that he was eligible to it: and they having so decided, no other department, either the Executive or the Judiciary, could review or reverse that decision; and, therefore, as the replication which, by the demurrer, is admitted to be true, shows the law to have been in force, and Hawkins to have been eligible and legally elected, it was *res judicata*, and the Governor's subsequent decision, refusing the commission, was of no effect or avail.

That one department cannot annul the acts of another is a new position in political science. The author of it is entitled to its full benefit by the law of discovery. Has it ever been doubted that Legislative action could be annulled by the veto, and Legislative and Executive action jointly by judicial decision? That Executive action could be annulled by legislation withholding of supplies and unnerving the power of the sword by striking down the arm which wields it?

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Has it ever been doubted that the Senate can annul Executive appointments, by refusing to sanction them, and that the Executive can annul Legislative elections, when the person elected is ineligible, by refusing to commission: or that the judiciary could do the same by a judgment of ouster on a *quo warranto*?

It is hardly necessary to refer to adjudicated cases to support a principle which plants so fixed a foot on the broad platform of common sense and political science. But it may be allowed to glance briefly at one or two.

In *Marbury vs. Madison*, the highest tribunal in the land decided, that to withhold a commission from a person entitled to it is an act not warranted by law: that the right to offices of trust, of honor, or of profit, is a vested legal right, entitled to the protection of the laws, and that in every case of the violation of a vested legal right, the law of the land affords a remedy to the injured individual.

In *Gould vs. Hutchins*, 1 *Fairfield*, 145, the Supreme Court of Maine directly annulled an act of the Governor, by which he disbanded a militia company under authority conferred by statute, on the ground that the facts furnished no sufficient basis for his action.

In *Barnford vs. Melvin*, 7 *Greely* 14, the same court decided that when a person held two commissions, one as a Justice of the Peace, and one as Deputy Sheriff, his acts were void, certainly his commissions were thereby annulled.

The very question here presented to the court has been decided in the State of Alabama, in the *State vs. Adams*, 2 *Stewart*, 231, upon *quo warranto*. The person was returned elected by the casting vote of the Sheriff, and the Governor considering that the Sheriff had no right to give the casting vote, commissioned another individual under a clause in the Constitution authorizing him to fill vacancies, precisely similar to ours. The court divided on the question whether the Sheriff could give the casting vote; but it was conceded on all hands in the language of *Safford, J.*, that "a commission does not confer the right to an elective office, except in case of vacancy, as directed by the Constitution: and that it is only evidence of the right which may be resisted, and either sustained or annulled according to the true result of the election." *Ib. p. 247.*

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But, as was before remarked, it is not necessary for precedent or adjudication. The replication shows that there exists in Hawkins a complete existing *present* right to the office—that he was legally elected to it, was and is eligible and not disqualified, and has never resigned, vacated, or forfeited it. The State pleads his *right* to the office, the respondent rejoins that she does not set out the *evidence* of that right: for the commission is but the evidence, and there is no better settled rule of law than that when a title is well pleaded it is unnecessary to set out the evidence of that title. There is no question as to the title to the office, because, by the demurrer, all the facts stated in the replication are admitted to be true.

This court is sworn to decide what the law is, for that is the very essence of judicial duty. The counsel does not contend that Hawkins was not entitled to the office, nor that the Governor ought to have issued the commission to him. He raises no question as to the law on this subject, or the rights of the parties under the law, but claims that this court has no power or right to decide what that law is, or to adjudicate upon those rights, because another tribunal has already adjudicated.

And he further contends that this court will not decide because it would do an idle and nugatory act, and pronounce a judgment which could not be executed. How, an idle and nugatory act? If this court gives judgment of ouster can they not execute that judgment? Have they no power to compel obedience, and prevent the respondent from acting when they have decided that he has no authority to act? But he suggests that the person claiming the office would be just as far from obtaining the evidence by which he could rightfully exercise the duties of it as he ever was, to wit: a commission. That person is no party to this proceeding—nor interested, except incidentally, in the decision to be given. The court is called on by the State to oust a person who improperly holds an office, not to put in one who should be there. Of course the gentleman's argument has no bearing upon the case. It is true that the person entitled to the office is interested in the event of this case, and if decided as he claims it should be, he will know how, through the tribunals of the country to collect the sala-

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ry which in law belongs to him, from those who have received it. So far the decision in this case will not be idle and nugatory.

It is not necessary to pursue this argument further. If the Executive of this State is armed with authority to displace every officer in the State, your honors included, to-morrow morning, by issuing new commissions to different persons, and thus arriving at absolute powers by this novel process of what the counsel call *adjudication*, then the demurrer will be sustained.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The defendant, in support of his demurrer, insists that a commission from the Governor to Hawkins is indispensable to his legal right to enjoy, hold, and exercise the office in question; that he never having obtained such commission there was a vacancy in the office which the Governor possessed the legal and constitutional right to fill, notwithstanding his election thereto by the Legislature, as stated in the replication; and that the Governor, in the exercise of his constitutional power and duty, having determined the existence of a vacancy in said office, and proceeded to fill the same by appointing and commissioning the defendant, his authority derived therefrom cannot legally be questioned, controverted, or annulled; because the exercise of such power by the judiciary, or any other co-ordinate department of the government, must, in its consequences and effect, destroy the independence of the Executive, and divest that department of its constitutional powers; and upon these principles the defendant mainly relies, but also denies that there was any law in force by which the Legislature was authorized to elect a Commissioner of Public Buildings when Hawkins was elected to fill that office.

These positions and principles are controverted by the attorney for the State, who insists that the matters as set forth in the replication and admitted by the demurrer to be true, conclusively show that there was no vacancy in the office in question when the defendant was appointed and commissioned thereto by the Governor, and therefore the Executive possessed no power whatever to make such appointment.

The matters of the replication pleaded by the State in avoidance of the warrant shown by the defendant, so far as they are well

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pleaded, the law, in the present attitude of the case, regards as being admitted to be true, and the simple question of their legal sufficiency to avoid or invalidate the right exhibited by the defendant is presented for the consideration and judgment of the court. But it is facts only, and not inferences or deductions of the pleader therefrom, set forth in the pleading, that are to be taken as true; and such inferences and deductions, though imprudently, or needlessly and improperly stated, must, according to the uniform and well established principles of law and practice, be altogether disregarded as irrelevant and impertinent; and the allegation in the replication that the act of the Legislature approved March 3d, 1838, entitled "an act providing for the appointment of Commissioner of Public Buildings," was a law in force on the 11th day of December, A. D. 1838, when the Legislature elected Hawkins to that office, is, in the opinion of this court, embraced within this rule, and although positively averred, it must be regarded as an inference or conclusion of the pleader, rather than a matter of fact, necessarily and properly stated in the pleadings, because it is the province and imperative duty of the court to know the law, (and the law presumes every court to have a knowledge of all laws,) which of necessity includes a knowledge of the time at which the law commenced and took effect; for no enactment of the Legislature can be operative as law until such force is imparted to it in some method recognized or admitted by the Constitution or laws, existing at and previous to the time when it becomes obligatory as a rule of civil conduct.

And from the view which we have taken of the facts presented by the pleadings, we have no doubt, that it is our first duty to ascertain and determine whether the statute aforesaid, approved on the 3d day of March, A. D. 1838, had the obligation of law on the 11th day of December, 1838, when the Legislature elected Hawkins in the manner therein mentioned.

For it must, in our opinion, be conceded that if no such election was authorized by law, it must be regarded as an idle, inadvertent, and unauthorized proceeding, not vesting in the person who received the majority of votes, and was declared duly elected, any legal right to the office, which by law must have been filled by an Executive

appointment. The Legislature, like every other department of the government, is bound by the law, and if the law then in being vested the power of appointment to the office in question in the Executive department, no other department could in any manner legally make the appointment; and there can be no doubt that the Governor possessed the power of appointing the officer in question until the statute of the 3d March, 1838, took effect, which divested him of that right, and vested the power in the Legislature. This office is created by statute, and the Legislature possessed the power of abolishing it altogether, or directing by law in what manner it should be filled; this latter power had been exercised when the office was created, and the appointing power conferred upon the Governor, which it was his right and duty to exercise, until the law imposing that obligation upon him was repealed. That it is now repealed, and the power of appointment vested in the Legislature, there can be no doubt, but the question is when was it repealed? Every one must admit that the repeal was concurrent with the taking effect of the statute of the 3d March, 1838. But when did this statute take effect? By statute approved November 18th, 1837, and in force from that day, it is declared that "none of the statutes that may be passed during the present session of the General Assembly, shall take effect, and be in force, until the Governor shall issue his proclamation declaring that such statutes are printed and ready for delivery, *unless a different day shall be expressed in the statute*" and another section of the same statute declares that "it shall be the duty of the Governor, as soon as the statutes that may be passed during the present session of the General Assembly are printed, to issue his proclamation in accordance with the provisions of the preceding section." *Rev. Stat. of Ark.* 699.

That it was competent for the Legislature to prescribe the time when these enactments should take effect and be in force, as law, there can be no question, and that the time was prescribed by the statutory provisions above quoted; where no time is expressed in the enactments of that session, their taking effect is made to depend upon a contingent event in the future, that is, upon the issuing of a proclamation by the Governor, and to this rule there is but a single exception, and that

is where the time is expressed in the act. This statute, in relation to the enactments of that session, abrogates the previous law on this subject, and prescribes a time different from, and inconsistent with the time previously prescribed by law; it establishes a new rule, but is not on that account less binding, and until it is repealed or superceded by some act of equal obligation, furnishes the criterion by which it must be determined when the statutes passed at that session acquire the efficacy and obligation of law; and such must be the case if the act is even to be regarded as of a local or temporary nature, because, under the provision of law above quoted the time at which the enactments of that session shall take effect does not, in any respect, depend upon the character of its provisions; whether they are of a public, general, and permanent nature, or of a private, local, and temporary nature, they are, we think unquestionably subjected to the same rule which, as before remarked, could only be modified, suspended, or abrogated by some act of Legislative authority possessing every sanction necessary to impart to it the force and obligation of law. The act of the 3rd March, 1838, entitled "an act providing for the appointment of Commissioner of Public Buildings," and the act aforesaid, approved November 18th, 1837, were passed at the same session of the Legislature, and the rule prescribed by the latter expressly applies to and suspended the operation as law of the provisions of the former, until the contingency happened upon which they were to be enforced, upon the Governor's issuing his proclamation for that purpose, or the law suspending their operation was so far repealed by some subsequent act of the Legislature possessing the force and obligation of law, as to give them such force prior to and without the Governor's proclamation being issued, neither of which being done until the 11th day of December, 1838, (the day on which the replication alleged Hawkins was elected by the Legislature Commissioner of Public Buildings,) the statute in question, approved 3rd March, 1838, had not, on that day, acquired the force and obligation of law, and the election of Hawkins, by the Legislature, to fill that office, was inadvertent and illegal, and did not confer upon him any legal right whatever to the office he was so elected to fill, nor can the facts set forth in the repli-

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cation, by any form of pleading them, avoid or invalidate the right exhibited by the defendant's plea, because they fail to show any legal incumbent of the office in question when the defendant was appointed thereto, and therefore the replication is, in the opinion of this court, insufficient in law to maintain the proceeding against the defendant.

THE STATE *against* JOHN HUTT.

ON QUO WARRANTO.

The office of State Treasurer, as well as those of Secretary of State, Sheriff, Coroner, Constable, and Militia officers, are all Executive. They belong to the Executive department, for the Constitution assigns them to that division of power, and makes all their duties necessarily of an Executive character. The office of Justice of the Peace is as much a Judicial office as the office of Supreme Judge.

No person therefore can, at the same time, hold the offices of Treasurer and Justice of the Peace:

A person holding one office has a right, if elected to another which he cannot hold at the same time, to accept it, but in so doing he vacates, *eo instanti*, the first office. Where a Justice of the Peace, therefore, was elected and commissioned State Treasurer, and accepted the latter office, he wholly vacated and annulled his office of Justice of the Peace.

A *quo warranto* issued against the defendant, *John Hutt*, summoning him to appear and show by what warrant he claimed to exercise the office and franchise of Justice of the Peace, in and for the county of Pulaski. The defendant appeared and pleaded in bar of the writ, "that he was duly elected Justice of the Peace, in and for the county aforesaid, and State of Arkansas, on the 1st day of October, A. D. 1838, for the term of two years, which period of time hath not yet expired, and that he was regularly commissioned by the Governor as Justice of the Peace for said county, on the 8th day of November, 1838, and that before entering upon the discharge of his duties he took the necessary oaths of office prescribed by law." A copy of his commission and his oath of office is set out and made part of his plea, and he further "averts that by this warrant he rightfully exercises the office and franchises of Justice of the Peace of the county aforesaid." To this plea, the attorney for the State replied "that after the election of the defendant to the office of Justice of the Peace as aforesaid, and after issuing to him his commission for the same, and his acceptance of said office, on the 20th day of November, 1838, and while he held and executed the office of Justice of the Peace, as aforesaid, he was duly elected, by the General Assembly, Treasurer of the State of Arkansas for and during the time prescribed by law, and there-

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after, to wit: on the 18th day of December, 1838, was regularly commissioned and properly qualified as such Treasurer, and that he then and there accepted said office, and hath continued, and still doth continue, to hold and exercise the rights, privileges, and franchises thereof; wherefore, the State prays judgment upon the writ, and that the defendant be ousted of the office of Justice of the Peace of the county of Pulaski, and of the rights, privileges, and franchises thereof." To this replication the defendant demurred, and the State joined in demurrer.

PIKE, for the State:

Hutt was elected a Justice of the Peace, for Pulaski county, on the 1st day of October, A. D. 1838, and commissioned on the 8th day of November next, following. He was afterward, on the 20th day of November, in the same year, elected Treasurer of the State, and commissioned and qualified immediately thereafter as such Treasurer, and the only question presented to the court is, whether by accepting the office of Treasurer, he vacated the office of Justice of the Peace. If he did, the State must have judgment of ouster upon the writ.

By the Constitution of this State, article 3, it is provided that the powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: those which are Legislative to one: those which are Executive to another: and those which are Judicial to another: and that "no person, or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

That the Treasurer of the State is a "person belonging to the Executive Department" is manifest; first, from the fact that the Constitution expressly includes him in that department by section 24 of article 5; and second, from the nature of his duties, which are neither, in any respect, Legislative or Judicial, but purely Executive.

That every Justice of the Peace is "a person belonging to the Judicial department" is, for the same reason, equally manifest. The office is created by the article upon the judicial department, and not

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only are the duties of Justice of the Peace, *as* a Justice simply, purely Judicial; but every Justice is *ex officio* a member of the County Court, which is a court of record.

Certainly then, unless the clauses in the Constitution first above quoted are a mere nullity and void of all meaning, no person can at the same time hold and exercise the two distinct offices of Treasurer of the State and of Justice of the Peace; for, if so, he is at the same time an Executive and Judicial officer, and while belonging to one department he exercises powers belonging to another, and it is equally clear, that if he cannot hold both, by accepting one he vacates the other. We shall not occupy the time of the court by arguing a proposition which is self-evident, but with a reference to one or two authorities we shall submit the question.

The Constitution of the State of Maine provides "that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted." The difference between this provision and that in our Constitution is merely verbal.

In 1825 the Senate of the State of Maine presented three questions to the Justices of the Supreme Judicial Court for their decision and determination. They were the following:

First. Can any person of right hold and exercise at the same time the several offices of Deputy Sheriff and Justice of the Peace?

Second. Can any person of right exercise at the same time the several offices of Sheriff and Justice of the Peace?

Third. Can any person of right exercise at the same time the several offices of Coroner and Justice of the Peace?

Upon these questions two of the Justices of the Supreme Court gave their opinion. They expressly declared that the *Governor, Secretary of State, and Treasurer*, were respectively a part of the Executive department, and that so also were Sheriffs and Coroners. That the Treasurer was an Executive officer, because he was named in the Constitution, and his election provided for under the article concerning the Executive department, and because he "aids the Governor in causing all the State taxes to be collected, and paid into the Treasury for the public use," and that Sheriffs and Coroners were also beyond

all doubt Executive officers. And they further decided that Justices of the Peace were a part of the Judicial department: and that the office of Justice of the Peace was incompatible with that of Sheriff, Deputy Sheriff, or Coroner; and that no person could of right at the same time exercise the office of Justice of the Peace and also the office of Sheriff, Deputy Sheriff, or Coroner. 3 *Greenleaf*, App. 484.

In 1830, the same question was presented to the Supreme Court of Maine, and that court then judicially confirmed the opinion previously given by the Judges, and declared that the offices of Deputy Sheriff and Justice of the Peace were incompatible under the Constitution, and that no man could hold both offices at one and the same time. *Bamford vs. Melvin*, 7 *Greenleaf*, 14.

LACY, *Judge*, delivered the opinion of the court:

The pleadings in the case present but a single question for our consideration and decision, which is, can the defendant at one and the same time exercise the powers and duties of the office of Justice of the Peace, and of Treasurer of the State? The examination and decision of this question involves the construction of the Constitution of the State, and the relative powers of the different departments of the government as organized and established by that instrument.

The Constitution declares that "the powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another;" and that no "person, or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." See *Art.* 3.

The evident design and intention of these provisions was to separate and divide the sovereign will of the community into three distinct departments of government, and to distribute that will amongst three separate sets of agents or public functionaries, and to assign to each a peculiar sphere of duties, and to make it supreme within the circle of its constitutional action. This wise and invaluable principle

lies at the very foundation, and constitutes the ground work of all the American Constitutions, and is their chief excellence and characteristic distinction. All the great and essential rights of life, liberty, and property, depend for their protection and preservation principally, if not exclusively, upon the separation and division of all the powers of government into three distinct departments, whose functions and duties are required to be exercised and performed by three distinct or separate sets of agents. The union or concentration of the powers of three separate departments into the same hands, be they few or many, is the essence of tyranny, and constitutes the means by which every species of oppression and injustice can be practised with impunity. The action of each department must necessarily be sovereign and supreme within its constitutional orbit, or it cannot be independent of the other departments, and it is uncontrollable so long as it acts within the circle of its constitutional jurisdiction. The moment any one department passes beyond its prescribed and ordained authority, its action is placed under the supervision and control of other departments and of the people. The joint and united action of three departments represent and constitute the sovereign will of the State, as created by and embodied in the Constitution. Their action is not wholly independent of, or disconnected from, each other, but they are joined and blended together in their united agency for the purpose of protecting and upholding the rights of the citizen and the government, while their constitutional jurisdiction and powers are carefully marked out and widely separated from each other. It is the duty of the Legislature to make and ordain the laws, of the Courts to expound and interpret them, and of the Executive to see that they are faithfully executed. These principles may be regarded as political axioms in the theory and science of all just and free governments, and they furnish the standard or criterion by which the different departments are contra-distinguished from each other, their respective duties ascertained and determined.

The Legislative department of our government is vested in the General Assembly, which is made to consist of a Senate and House of Representatives. See *Art. 4, of the Const.*

This provision of the Constitution certainly excludes in express terms

the office of Justice of the Peace and of Treasurer of the State from that department; for all Legislative power whatever is exclusively given to the Senate and House of Representatives, as a constituent department of the government. No rule of interpretation then can include the offices of Justice of the Peace and of Treasurer of the State, either by express grant, or necessary implication within the Legislative branch or division of power: besides the Constitution itself has assigned them to the other departments. The Constitution creates the office of Governor, and makes him the supreme Executive officer of the State, and the head of that department of power; it makes it his duty to take care that the laws are faithfully executed, and to aid him in the performance of this duty it establishes other Executive officers and assigns them to the Executive department. See *Art. 5*. Among them is the office of Secretary of State, of Treasurer, Auditor, Sheriff, Coroner, Constable, and Militia officers: all these officers strictly belong to the Executive department, for the Constitution assigns them to that division of power, and makes all their duties necessarily of an Executive character. They constitute the agency or means by which the Executive will is carried into effect, and the laws of the land executed and enforced. As the Executive cannot perform personally all the duties of his department, these offices are established by the Constitution to aid and assist him in the discharge of his legal and constitutional obligations.

These principles are unquestionably established as well by the formation and organization of the offices themselves as by the nature and character of the duties prescribed to be performed, and they rest upon the highest weight of authority, and upon the clearest deductions of reason. The Supreme Court of Maine have declared upon a case involving the construction of the Constitution of that State, in regard to the division and separation of the three departments of the government, that "the Governor, Secretary of State, and Treasurer, were respectively a part of the Executive department, and so also were Sheriffs and Coroners; that the Treasurer was an Executive officer, because he was named in the Constitution, and his election provided for under the article concerning the Executive department, and because he aids the Governor in causing all the State taxes to be col-

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lected and paid into the Treasury for the public use," and they further decided "that Justices of the Peace were a part of the Judicial department, and that the office of Justice of the Peace was incompatible with that of Sheriff, Deputy Sheriff, or Coroner, and that no person could of right at the same time exercise the office of Justice of the Peace, and also the office of Sheriff, Deputy Sheriff, or Coroner." 3 *Greenleaf's App.* 484. See also debates upon the Constitution of the United States. *Federalist*.

It follows, from the principle above laid down and established, that the office of Treasurer of the State is an Executive office, and that all its powers and duties belong strictly to the Executive department.

It only now remains to be seen to what department, under our form of government, the office of Justice of the Peace rightfully belongs. This point is clearly and conclusively settled by the Constitution itself, for it declares that "the Judicial power of this State shall be vested in one Supreme Court, in Circuit Courts, in County Courts, and in Justices of the Peace," and that "the General Assembly may also vest such jurisdiction as may be deemed necessary in Corporation Courts, and when they deem it expedient may establish Courts of Chancery." *Art. 6, sec. 1.*

Sections third, ninth, and fifteenth, of the sixth article as above quoted, define and limit the constitutional jurisdiction of Justices of the Peace, and they are all perfectly explicit in showing the office to be exclusively judicial, and that all its duties strictly appertain to that department of power.

The office of Justice of the Peace is as much a judicial office as the office of Supreme Judge, or Circuit Judge, for its power and being are derived from the same source, and stand precisely upon the same constitutional provision or enactment. If the conclusions to which the court have arrived be true, and that they are seems to our minds to be almost a self-evident proposition, then the office of Justice of the Peace belongs exclusively to the Judicial, and that of Treasurer of the State to the Executive department; and this being the case the Constitution forbids, in express terms, any person or collection of persons from exercising the powers and duties of these two offices at one and the same time. See *Art. 3.*

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The enquiry next is, as the defendant cannot exercise and hold both offices at one and the same time, which of them is vacated and annulled. Is it the office of Justice of the Peace or Treasurer of the State?

Every citizen has the unquestionable right of filling either of these offices, provided he brings himself within the constitutional requisites or qualifications. To fill either office legally, and constitutionally, it requires the joint action of the electors, and his acceptance of the office. When both these acts concur, then the office is rightfully filled. The commission of the Governor is evidence of the incumbent's right to the office, and of his authority for its exercise. In the selection of an incumbent to fill any office the electors' right to choose is wholly unrestricted except in the manner pointed out by the Constitution or by the laws, and consequently they can elect any individual they please. Their right to vote for him cannot be questioned if he possess the legal and constitutional requisites for the office; and if this be the case, it would render that right nugatory, or of no effect, if the person chosen did not possess the right to accept the office. To give to the electors the authority for selection, and at the same time deprive the incumbent of the power of acceptance would be virtually to annul the right of suffrage itself. This would be giving a right and taking away all the means by which it could be enjoyed, which involves such manifest absurdity and contradiction that it is impossible for it to be true. If the person voted for has an unqualified right of acceptance of the office to which he is elected, the moment he determines his will or election in regard to it and accept the office, that instant of time he of course resigns or vacates any other office he holds incompatible with the one he accepts. This is strictly true in regard to all offices whose duties are inconsistent with each other, and belong to separate departments of the government. The authorities are so clear and conclusive on this point we deem it unnecessary to add any thing more in support of the principle except merely to refer to them. *Johnstone vs. Margetson*, 1 *Henry Blackstone*, 260; *Milward vs. Thatcher*, 2 *T. R.* 81.

The pleadings in this case admit the fact that the present defendant, John Hutt, is in the full possession and enjoyment both of the

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office of Justice of the Peace, and of Treasurer of the State. This being the case, of course he is constitutionally ineligible to hold and exercise both these offices at one and the same time, because they belong to separate and distinct departments of the government. It therefore necessarily follows that his election to and acceptance of the office of Treasurer of the State wholly vacated and annulled his office of Justice of the Peace of the county of Pulaski.

The application of these principles to the question raised upon the demurrer and the replication, conclusively demonstrate that the former is fatally defective, and the latter fully sufficient to invalidate the warrant that the defendant has shown in his plea for the exercise of the office of Justice of the Peace.

*STEVENS and WOODS against THE STATE.**ON CERTIORARI to Pulaski County Court.*

All property in this State must, by the Constitution, be taxed according to its value ; and the tax thereon must be equal and uniform throughout the State.

The Legislature has no power to discriminate, and fix upon one description or species of property a greater tax than that fixed by law upon every other description or species of property of equal value, subjected to taxation.

Every individual may lawfully acquire and possess any species or description of property, if he does not thereby destroy or deprive some other person of his property, or some enjoyment thereof, in which he is protected by law.

But property, when acquired and possessed, must be so kept and disposed of as not to injure any paramount legal right of another, or affect injuriously the public morals, or public good, so far as they are protected by law.

The Legislature cannot restrict any one from making or purchasing a billiard table ; but may, by law, so regulate or restrict the use of it, as to prevent any injury therefrom to the public morals or public good.

No individual in this government does, or can, have or possess any privilege which is not common to every other citizen of the State, until it is created by law, and acquired by him under authority thereof, and in the manner therein designated.

The Legislature can tax no privileges, except those created by law, and legally existing at such time as the law imposing the tax directs it to be levied thereon.

The Legislature cannot, by prohibiting the exercise of a right common to every citizen, and then allowing its exercise upon payment of a tax, create it a privilege.

The privileges made taxable by the Constitution, are such as cannot be exercised or enjoyed by any citizen or integral part of the community, without the intervention of some statutory provision, granting to, or conferring upon one or more individuals the right of doing some particular thing, as the right of banking, keeping a ferry, &c.

It might also embrace such as enjoy any privilege by way of exemption from the performance of onerous duties imposed upon the great mass of the community, if such exemption be first created by statute ; but this admits of great doubt.

Keeping a billiard table cannot be made a privilege, under that clause of the Constitution which provides that all property shall be taxed according to its value ; but that the Legislature may tax merchants, hawkers, pedlars and privileges. It is not a privilege, and therefore the law imposing a tax of five hundred dollars for every six months on each keeper of a billiard table is unconstitutional and void.

This was a proceeding upon a writ of *certiorari* to the county court of Pulaski county, issued upon the petition of plaintiffs, requiring the county court to certify and send to the Supreme Court a transcript of the record of the tax book of said county, embracing the State and county taxes assessed in said county for the year 1839, with all orders and objections made upon the consideration and adjustment thereof, and other things touching the same, on which it is alleged that the plaintiffs stand charged with the sum of one thousand dollars as the

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semi-annual tax, in said annual tax-book, as the keepers of two billiard tables in the county of Pulaski for the term of six months. By the return to said writ it appeared that the ordinary annual assessment list of the persons and property in said county, supposed to be subject by law to taxation, embracing billiard tables, was duly returned by the Sheriff, and regularly filed in the office of the Clerk of the Circuit and County Courts of said county, on the 23d day of March, 1839, and that the plaintiffs were, by the style of *Woods and Stevens*, assessed as the keepers of two billiard tables, with a tax of one thousand dollars, but the term of time for which they were so assessed and charged with said tax was not stated in the assessment list, that due notice of the return of said list was given by the Sheriff on the 25th day of March, 1839, that no appeal from the assessment made by the Sheriff was taken by the plaintiffs to the County Court, and that the County Court, at the first term thereof, after the same was returned and filed as aforesaid, on the 26th day of April, 1839, adjudicated upon said list and levied the county tax to be charged and collected thereupon, that the tax book was made out by the Clerk from said assessment list, agreeably to the order of the County Court, and on the 28th day of May, 1839, a regular warrant was endorsed thereon, in the form prescribed by law, with the seal of the County Court thereto affixed, and that the plaintiffs were charged in said tax book as the keepers of two billiard tables, with a State tax of one thousand dollars, which the Sheriff, by the warrant aforesaid, was required to collect and pay in the manner and within the time prescribed by law for the payment thereof.

PIKE, for the plaintiffs:

The only questions in this case for the consideration of the court, are:—

First. Whether so much of *sec. 5, chap. cxxviii*, of the *Revised Statutes*, as imposes upon the keeper of every billiard table in this State, for every term of six months, the sum of five hundred dollars for each table, as a State tax, is constitutional?

Second. Whether, if constitutional, that tax can be collected by placing in each *annual* assessment list and tax book a semi-annual tax

without any regard to the time during which the tables are to be kept, and collecting by levy and sale as other taxes?

As to the first question, it is confessedly one of great delicacy, but from which the court will of course not shrink. All laws, and this as well as others, must be tried by the standard of the Constitution. If contrary to any provision of that instrument, the court would violate its oath if it were not to enforce that which purports to be law and is not law but void.

The Constitution expressly and in distinct words provides that "all property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. *No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value.*"

"What cannot be done directly cannot be done indirectly," is a maxim of familiar application in the law, but it has a more significant meaning when applied to questions arising under the Constitution. If one species of property cannot *directly* be taxed higher than another species of the same value, it cannot be done indirectly. There is no fiction of law, there can be no quirk or quibble of legislation, whereby it can be so arranged that the mere billiard table itself can be taxed in any way whatever, except by a per centage upon its actual value.

It is therefore necessary, in order to sustain the law in question, that resort should be had to the succeeding clause of the Constitution, which provides that "the General Assembly shall have power to tax *merchants, hawkers, pedlars, and privileges*, in such manner as may from time to time be prescribed by law." It is contended that the law which imposes a tax of a thousand dollars a year is warranted by this broad word, privileges, and that not the billiard table is taxed, but the privilege of keeping it, not the article itself, but the right of keeping the article. It will therefore be necessary to examine the word "*privileges*," as used in the Constitution.

The fundamental provision as to the revenue is that all taxes shall be *ad valorem*. The exception is the tax on merchants, hawkers, pedlars and privileges. The exception then as to privileges must not have a construction given to it which, by extension, could swallow

up or even, to any extent, contravene the general policy of the Constitution.

The meaning of the word "privilege" is to be looked for in the common law. In the realm of England, and by the English law, there were a multitude of privileges of various kinds, most of which never crossed the Atlantic or took root in our soil. Among them were privilege from arrest of Peers, of Ecclesiastical persons, of Ambassadors of ancient demesne, of suits, of the chace, of the crown, of physicians, of the universities, &c.; but none of these are known here. Except in such instances as these the word privilege was synonymous with *franchises*, and in order to ascertain the meaning of one of these terms it will be necessary to look to the definition of the other.

It is laid down that all franchises are derived from the King, and ought to be claimed by charter or prescription, which supposes the grant of the King. *Com. Dig., Franchises, C. A.; Strata Marcella, 9 Co. 27 b.* Among these are enumerated the privilege to be a corporation, to have treasure trove, waifs and estrays, wreck of the sea, a court leet and other courts, royal fishes, fairs, markets, &c.; frank soldage, the custody of a jail, comisance of pleas, deodands, to have a sanctuary, to make a corporation, to make a coroner, to have fines, the county palatine, the cinque ports, &c.

It was the theory of the common law that all these privileges, liberties, and franchises spring from the crown; some of them, it was held, were originally parcel of the flowers of the crown, as waifs, deodands, wrecks, &c., and if these came again to the King they were held to be merged in the crown. Others were held to have been originally in the beginning erected and created by the crown, and if they came to the crown again they were not merged, as fairs, markets, hundreds, leets, parks, warrens, &c. *Strata Marcella, 9 Co. 27.*

In this country few, if any, privileges exist by prescription, and few of those known in England exist by Legislative grant. But it is a certain class of privileges created in all the States by grant from the Legislature, such as banking, the privilege of keeping ferries, and holding and keeping toll-bridges, of making and receiving toll on turnpikes, canals, and rail-roads; and unquestionably other privileges of the same nature might be created, and when created, would be

taxable. These are all special rights, powers, and privileges, not existing before, but created *pro hac vice*, and granted out by her Legislature as exclusive rights and franchises. Such privileges which are sources of wealth, or rather wealth in themselves, created and conferred by Legislative grant, and not capable of valuation like tangible and corporeal property, are properly taxable as privileges.

But the Legislature cannot, by first prohibiting the use of any article or the exercise of any calling, and then allowing it upon payment of a certain sum into the Treasury, create a privilege. If this could be done, there would no longer be any meaning or effect in the provision that no one species of property should be taxed higher than another species of property of equal value. If this could be done, the Legislature could tax every bureau a hundred dollars, or every table, or chair, or sofa, or book-case, to the same amount, merely by prohibiting the use or possession of each article except upon payment of such sum, and so making it a privilege to have, use, or possess it. They might pass sumptuary laws, and tax shoes, boots, hats, coats, cloaks, and every article of dress, comfort, luxury or necessity, by pursuing the same course, and making it a privilege to have, wear, or possess it.

There are certain rights which belong to us as freemen; we do not derive all our rights from Legislative grant; we have some which belong to us by nature, and as citizens of a free country; such are the rights of holding any species of property we choose, of wearing whatever garments we choose, and of possessing and holding any article of comfort or luxury which we please. As all then belong to us originally, they cannot be converted into privileges by any process of Legislative alchemy. No such magical transmutation can be effected. If it could, nothing would be easier than by the enactment of sumptuary laws and acts creating privileges to transform us at one sweep from free citizens of a republic to the mere serfs of the soil.

The right to keep and use a billiard table is one of these common rights. It is an article of furniture which every citizen had the right to own and possess before we framed the Constitution, and the Legislature cannot confer upon us the *privilege* of keeping what we already *ex communi jure* have the right to keep and use. Privileges are not so

created; if they are, every thing can be transmuted into a privilege, and by undergoing this process, an article of property worth a hundred dollars may to-day be taxed one dollar and to-morrow a thousand, while another article of the same, may still remain subject to the original tax of one dollar. Why not in the same tax the privilege of raising cotton, or hemp, or wheat, and so make a tax payable by one portion of the State alone.

The playing of billiards has not been yet made a criminal or penal offence, and therefore every person has the right either to keep or play on such a table. He has the same right to do so that he has to keep or play on a flute, violin, or organ; and if one can be made a privilege while it is lawful for every man, so may the other. There is nothing unlawful or criminal in one more than in the other, by the law of nature, or the code of morality, neither *malum prohibitum* or *malum per se*. To keep a billiard table therefore stands upon the same ground with keeping any other article of furniture, or for the purpose of amusement, and one cannot be changed into a privilege any more than the other.

A privilege, therefore, is a new right created by Legislative grant; not a right existing before and common to all, but now prohibited unless on payment of a sum into the exchequer. It is a portion of the prerogative of the State, carved out and given to an individual or a corporation. This is no such privilege. Nor could a privilege be created by declaring the keeping of a billiard table criminal, and then allowing it on payment of a sum in gross; that would be pandering to crime and present the strange spectacle of Legislative creation of a privilege to commit crime. It might be forbidden altogether, but it could never be made a privilege.

The keeping of a billiard table, therefore, is no privilege, and therefore cannot be taxed as such, and if so, it follows, as an inevitable consequence, that the law in question is unconstitutional. That it is so we have not the slightest doubt.

But admitting that it is not, still it cannot be collected as here at tempted; it is improperly placed in the annual tax book; and the officer had no authority either by law or his warrant to levy upon property from which to make and collect it.

Stevens and Woods *against* the State.

By the 12th section of the chapter on revenue, in the Revised Statutes, the assessor in each county is required to assess certain species of property therein designated *for annual taxation*; and such assessment is to be made of such property only as is liable to an *ad valorem* tax, and though by section 9, he is required to take an accurate account of all taxable inhabitants, property and privileges made taxable in his county, yet that must be understood to apply only to such privileges as are taxed with an annual tax.

By the warrant attached to the tax book, and which is the collector's authority, and the only authority under which he can act in the premises, he is commanded solely to collect *at certain rates* and *ad valorem* on all property therein taxed, and therefore no authority whatever is thereunder given him to collect a sum in gross of any person, or for any purpose whatever.

That the tax of five hundred dollars for a billiard table for six months is wrongly placed in the assessment list for the year, and cannot in that manner be collected, is manifest from the fact that in such case there would be no method of collecting the tax for the last six months in the year, or in case a person commenced keeping a table after the assessment for the year had been made, and also from the fact that a person is not required in any event to pay the tax for six months, or may do so for any time, however short, during which he desires to keep his billiard table.

It may be that the law is inoperative even if constitutional, by reason of the failure to prescribe any method for collecting it. No provision is made for the issuing a license to keep a billiard table, and no mode is pointed out by which the tax can be levied. But, however this may be, there can be no doubt that the tax, if it can be collected at all, can be assessed in the assessment list of annual taxation; and if it could, by what right does the Sheriff fix it arbitrarily at six months? If he could do that, he could as well, and with more show of reason, charge the whole tax for twelve months.

Whatever may be the method of collecting the tax it must be *one*. There cannot be one mode of collecting of these individuals and another of collecting of persons who commence keeping billiard tables after the annual assessment.

It is alleged in the petition that the Sheriff has levied upon the property of the petitioners for satisfaction of this tax. By what warrant? The writ of the Clerk attached to the tax book gives him no such authority, and he has none by any general provision of the law.

A tax imposed under a law which violates the Constitution, levied in violation even of that law, and attempted to be collected without warrant or authority, must of course be in violation of the rights of the citizen, and if so, should be perpetually superseded.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The tax in question appears to have been assessed and charged against the plaintiffs as the joint keepers of two billiard tables, as upon the privilege of keeping them by the authority and under the provisions of the 5th section of the 128th chapter of the Revised Statutes of this State, page 674, which enacts that "there shall be levied and collected as a State tax the sum of five hundred dollars on the keeper of every billiard table in this State, and the like sum on every keeper of a nine-pin alley, for the period of six months, and at the same rate for a shorter time, and no person shall have or use any billiard table or nine-pin alley without first paying to the Sheriff the tax required by this act."

The plaintiffs insist that the tax thus imposed upon the keeper of a billiard table is not warranted by the Constitution, and that the enactment above quoted is repugnant thereto and void, and if valid, cannot be enforced in the manner attempted against them.

In support of the former position they contend that a billiard table is in every point of view "property," which, under the provisions of the Constitution, every person has an indefeasible right of acquiring, possessing, and protecting, and that it can only be taxed according to its value; and in support of the latter they urge the impossibility of enforcing the enactment, because the manner of assessing and collecting the tax in question is no where prescribed by law.

No questions of more importance, or greater delicacy, than these have ever been presented to this court, or received a more patient and careful consideration, and to the mind of the court they present difficulties of no ordinary character. The right of the citizen to acquire,

possess, and protect property, cannot be questioned, for it is expressly secured by the first section of the second article of the Constitution, which declares that "all free men, when they form a social compact, are equal, and have certain and inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."

The term property has a most extensive signification, and according to its legal definition consists in the free use, enjoyment, and disposal "by a person of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 *Blackstone's Com.* 138. Therefore, whatever a person acquires is his property, and according to the theory and practice of all governments, may be subjected to a tax, unless the right of taxation be restricted by some fundamental law to some particular species or descriptions of property; and subject to the like restriction, a greater or less amount of tax may be imposed *ad valorem*, or otherwise, according to the will of those to whom the taxing power is confined. In this State the Constitution ordains that "all revenue shall be raised by taxation, to be fixed by law," and that all property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax is collected shall be taxed higher than another species of property of equal value, provided "the General Assembly shall have power to tax merchants, hawkers, pedlars, and *privileges*, in such manner as may from time to time be prescribed by law." *Const. Ark. title Revenue, S. 1 and 2.* From this quotation it will be perceived that the Legislature is bound by the Constitution in fixing the State tax on property so to regulate it that every species or description of property subject to taxation shall, according to its value, pay an equal ratio or amount of revenue to the State; or, in other language, property shall be taxed according to its value, and the tax thereon shall be equal and uniform throughout the State. This rule, as to the State revenue, is inflexible, and leaves with the Legislature no power to discriminate and fix upon one description or species of property a greater tax than that fixed by law upon every other

description or species of property of equal value subjected to taxation. In this case, the power of the Legislature to impose a tax upon the billiard tables in question, equal to that imposed upon other property by law, has not been controverted by the plaintiffs, and is understood to be conceded by them. But they deny the power of the Legislature to prohibit them from possessing property without first paying a tax, not upon the property itself, but for the right to possess or keep it. We have already adverted to the legal definition of property, and, as we apprehend, shewn conclusively that every person in this State has a pure and indefeasible right to acquire, possess, and protect it, and that it cannot, as property, be subjected to any other than an *ad valorem* tax.

And, if these positions be correct, it results therefrom, in our opinion, that the power to prohibit the acquisition and possession of property is unquestionably withdrawn from the Legislature: and the right of every citizen is in this respect perfect and plenary, and may be enjoyed without any other restraint than such as shall be necessary to the preservation of the individual rights of others, or the general welfare of the community. Thus every individual may lawfully acquire and possess any species or description of property, if such acquisition or possession does not destroy or deprive some other person of his property, or some enjoyment thereof, in which he is protected by law. But property when acquired and possessed must be so kept and disposed of as not to injure any paramount legal right of another, or affect injuriously the public morals or public good, so far as they are, or may be, protected by law.

We are, therefore, of opinion that the Legislature may, by law, for the purposes aforesaid, regulate and restrict the use and keeping of property, but cannot prohibit altogether any person whatever from legally acquiring and possessing property generally, or any particular species or description of property. Thus, for instance, they cannot prohibit any one from making or purchasing a billiard table, because it is an article of property, and, under the Constitution, any one may lawfully acquire, possess, and protect it as such; but the Legislature may by law so regulate or restrict the use of such table as to prevent any injury to the public morals or public interest therefrom, in

precisely the same manner that the use of other property generally may be regulated or restricted. The distinction being between a prohibition against the acquisition and possession or keeping of property and the imposition of burthens upon the property itself, or restrictions upon the use thereof; or between the total destruction of the right to acquire and possess property, and the regulation thereof in such manner as to prevent injury either to individual or public rights, and promote the public welfare. The former the Legislature is prohibited by the Constitution from doing, the latter that department is not restrained from acting upon "according to its free will and sovereign pleasure."

This court is therefore of the opinion that so much of the fifth section of the enactment of the Legislature above quoted as purports to prohibit every person from having a billiard table, without first paying to the Sheriff the tax mentioned in said enactment, is repugnant to the first section of the second article of the Constitution of this State, and therefore void. But it will be remarked that the tax in question does not purport to be a tax on the table as property, but simply on the plaintiffs as the keepers thereof, or upon the privilege of keeping them, and therefore the attorney for the State insists that it is within the proviso or exception above quoted, which expressly reserves to the General Assembly the power of taxing merchants, hawkers, pedlars, and privileges, in such manner as may from time to time be prescribed by law, because, as he contends, all persons are prohibited by law from having, or using, any billiard table, without first paying the tax imposed upon it by the statute, while every person upon paying such tax is authorized by law to keep and use such table, and therefore the law creates a privilege to be enjoyed only by such as pay the tax mentioned in the statute, which is clearly a tax upon this privilege, which the Legislature has competent power to impose. The plaintiffs deny that it is within the legitimate power of the Legislature to create a privilege by first prohibiting the enjoyment of some right common to every citizen of the State, and then suffering such only as will pay a specified sum of money to the State, as a tax, the liberty of enjoying such right. The proviso under consideration designates certain objects which form an exception to the general rule prescribed

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for raising revenue upon the basis of property, *ad valorem*, and may be subjected to taxation by law without regard to that principle, the power of the Legislature in respect thereto being expressly reserved *propria vigore*; consequently the Legislature may, in its discretion, enforce a tax of any amount upon either of the subjects mentioned in the proviso, without any respect to the value thereof and regard to the equality and uniformity of the tax throughout the State. For instance, two merchants, each employing the same amount of capital at different places, or at the same place, may, without violating the constitutional rights of either, be taxed the one in a larger sum than the other. So, likewise, a clock pedlar may be taxed higher than a pedlar of jewelry, tinware, groceries, &c., or *e converso*, or the one may be taxed and the other not, and the same privilege applies to hawkers and privileges as to all which the Legislature possesses the power of making such discriminations as that department shall determine to be proper. Because it is not only not withdrawn from, but expressly reserved to them, by this proviso in the Constitution. Yet they have not the power of absolutely prohibiting any person from becoming a merchant, hawker, or pedlar, until he shall have paid a tax as such, because it is parcel of the public liberty of every citizen to employ himself or his capital in such manner as he may choose, provided he does not invade the legal rights of another, or contravene the public policy of the community as regulated by law. Therefore, this right is indefeasible and secured by the Constitution to every citizen in common. Such, however, is not the case in this particular as regards privileges, for it is a primary and most essential principle of our Constitution and government, forming as it were the base upon which the whole superstructure rests, that every citizen is by nature endowed with equal rights and equal privileges, consequently no individual in government does or ever can have or possess any privilege which is not common to every other citizen of the State, until it is created by law and acquired by him under the authority thereof, and in the manner therein designated; and surely no one indulges the supposition or entertains the opinion seriously that it was the design of the Convention to leave with the Legislature, to be exercised at will, the power of taxing every right enjoyed in common by the whole community, or of taxing

them in any other manner, or by a different rule, from that prescribed in the Constitution; or that such power is insidiously reserved, concealed under the mask of a special authority to tax privileges, inserted in the Constitution by way of exception to the general rule. If such should be the case the insertion of any general principle or rule to regulate the raising of revenue was superfluous, if not absurd, and therefore, in our opinion, such power was intended to be, and is, by the Constitution, withdrawn from the Legislature, and although that department has constitutionally the power of subjecting to taxation merchants, hawkers, pedlars, and privileges, by law, in such manner as they shall think proper, such tax can only be imposed upon merchants, pedlars, and hawkers, who are actually engaged or concerned in the business of merchandizing, pedling, or hawking, and upon privileges created by law and legally existing at such time as the law imposing the tax directs it to be levied thereon.

Having thus stated the most important principles which we consider immediately applicable to the question presented by the case before us, the duty devolves upon us of considering and deciding whether the right of using a billiard table constitutes a privilege, within the meaning of the proviso of the Constitution, upon which a tax may be imposed. We have already expressed the opinion that a billiard table is property, and that the Legislature cannot prohibit a citizen from acquiring, possessing, and protecting such property, but that they can by law regulate or restrain the use of it, so that no injury shall result therefrom to the public; and further, that a right common to every citizen of the State, cannot, by being first prohibited by law, and then allowed to be enjoyed by such only as will first comply with certain conditions prescribed by statute, be created a privilege within the meaning of the Constitution which may be subjected to taxation at the will of the Legislature, and that a privilege to be the subject of taxation must legally exist before it can be taxed, that is, its existence must necessarily precede the tax, and not depend upon the condition of a tax being first paid before it acquires life and being: otherwise, the sum paid would be a bonus or consideration for obtaining the privilege, instead of a tax upon the privilege. It would be the subject of stipulation and contract between the State and the party purchasing

the privilege, rather than a legal imposition upon the privilege enjoyed. It would not, as every other imposition of taxes does, depend alone for its obligation and efficacy upon the statute, which in such case could not be enforced, as all laws are or may be, without any act of the party. Besides this, the right of using a billiard table, subject to the law regulating or restraining its use, is a common right, enjoyed by every citizen, which he could legally exercise without restraint, and without the aid of any law conferring such liberty or creating such privilege; and hence the necessity of first inhibiting the right to use such table before the attempt to impose a tax upon the use of it as a privilege. But if we are not mistaken in the nature and character of this right, the Legislature is as competent to inhibit the culture and acquisition of cotton, or corn, or the acquisition of horses or negroes, or any other article, species, or description of property, and then permit the production of the former, or the acquisition of the latter, by such persons only as will first pay to the State a sum of money for such liberty or privilege. They are all by the principles of our Constitution and government open to the enterprize of every citizen, without any restriction, and may in any lawful manner be acquired and possessed by all without the intervention of any grant or privilege from the government, although their rights may be respectively so regulated by law as to prevent their exercise from operating injuriously upon the morals or interests of the community, still they can neither be destroyed, or their existence be made to depend upon any act to be performed, or pecuniary consideration paid to the State; and we apprehend that no one has ever entertained the opinion that the Legislature could subvert this most equitable and important principle of taxation, by first prohibiting the exercise of a right common to all, the benefits of which were intended to be permanently secured to the citizens by inserting it in the Constitution as a law binding upon, and so operating as to control the Legislative department, in the exercise of its legitimate and otherwise uncontrolled power of imposing burthens upon the people, by way of taxation, upon such principles as they might think proper to establish by law, without regard to its operation being equal or uniform; such, for instance, as the right of acquiring and possessing land, and then transforming and creating a

privilege out of such right, subject to arbitrary taxation, by permitting such only to enjoy the right as will pay to the State a specified sum of money arbitrarily prescribed by the Legislature before he can purchase or acquire title to, or possess, or cultivate, lands in this State, and yet the power of establishing and enforcing such imposition depends upon precisely the same principle as the power of prohibiting. And upon the like condition authorizing the "keeping" of a billiard table, neither of which is, or, in our judgment, can be, by any act of the Legislature, created a privilege subject to taxation as such within the meaning of the proviso in the Constitution. The privileges there contemplated being, in our opinion, such as cannot be exercised or enjoyed by any citizen, or other integral part of the whole community, without the intervention of some statutory provision granting to, or conferring upon, one or more individuals, the right of doing some particular thing, as, for instance, the right of banking, of keeping a ferry across a navigable water where it is exclusive, of constructing a public road with the right of receiving tolls of such as travel thereon, and the like, and perhaps it might also embrace such as enjoy any privilege by way of exemption from the performance of onerous duties imposed upon the great mass of the community, if such privilege be first created by statute; but it certainly admits of serious doubt whether the latter class of privileges, if any such exist, were meant to be embraced by the proviso in question. And although we expressly reserve that question, and will not now express any opinion upon it, yet it appears to us most probable that it was not the intention of the Convention to embrace them therein, because privileges, by way of exemption, are generally, if not always, created in favor of those who have paramount public duties to perform, the performance of which might conflict with their obligation to discharge such minor duties from which they are exonerated, or to such as are considered unable to bear the burthen of discharging such obligations, in consideration whereof they are exempted or privileged therefrom, either on the ground of necessity or of public policy, and the injustice of subjecting such privileges to taxation is so apparent as to make the impression that such was not the design of the Convention, and, on the other hand, it is evident that the class of privileges first mentioned might, in some instances at

least, constitute proper objects of taxation, because they confer upon the possessor extraordinary rights not unfrequently coupled with special exemptions, and generally productive of pecuniary gain, though, perhaps, in a ratio very unequal in reference to the capital employed, and therefore the power of imposing such tax upon them respectively, without regard to uniformity or reference to the amount of capital employed, was, in our opinion, very appropriately left in the discretion of the Legislature. But it may be said that rights of this description are not in legal contemplation embraced by the term privileges, and this perhaps might be urged with some appearance of plausibility, if the term must necessarily be understood as being used in its most limited 'technical meaning, according to which it would probably be restricted generally, if not entirely, to the various descriptions of exemption recognized by the common law, such for instance as that an attorney at law shall not be arrested in a civil action, and shall only be sued by bill in the court of which he is an attorney, that a citizen of the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Eli, and of the universities, shall not be sued in any other than their respective courts, and numerous privileges of a similar character extended by the common law to particular persons or places by way of exemption from some duty imposed upon or authority exercised over all other persons and places.

But upon examination it will be found that few, if any, of this class of privileges were ever recognized or admitted in any of these United States, to the situation and local concerns of which they are generally inapplicable, and some of them are opposed to the fundamental principles of our institutions and government, nor was any of them recognized in the jurisprudence of this Territory when the Constitution was framed and adopted, and therefore the presumption is almost irresistible that they were not in the contemplation of the Convention. Besides, even at common law, the term privileges embraced such rights as those first mentioned, although some of them are perhaps more appropriately designated by the name franchises, and are generally classed and referred to in the common law by that name, yet the meaning of the term privilege and franchise if not synonymous is so apposite, that they may without much impropriety be used as compre-

hending the same class of objects generally, and in this sense we think it must be understood as used in the Constitution, every part of which must be construed with reference to the whole, so that each part may operate harmoniously in advancement of the general object and design, which, in regard to taxation, appears to have been an equalization of the burthen, and this it was supposed would be best attained by requiring all property subjected to taxation for State purposes to be taxed according to its value, excepting only merchants, pedlars, hawkers, and privileges, subject to which the rule was not supposed to apply with as great certainty, propriety, and justice, by reason of their great diversity and the difficulty of ascertaining their respective value and applying to them with equal justice and propriety any permanent fixed rule.

But, however this may be, we deem it unnecessary to pursue the general investigation further, as the whole subject of privileges is not necessarily involved in the decision of the case before us, and we are decidedly of the opinion that the facts presented by the record before us do not show a privilege enjoyed by the plaintiffs, which, under the Constitution, could be made the subject of taxation as such, and that so much of the fifth section of the statute above quoted as purports to impose a State tax of five hundred dollars on the keeper of every billiard table in this State for the period of six months, and at the same rate for a shorter time, is in conflict with and repugnant to the provisions of the Constitution of this State, contained in the second section thereof, under the title "Revenue," and therefore void.

Wherefore, it is the opinion of this court, that the State tax of one thousand dollars assessed and charged against the said plaintiffs by the Sheriff of Pulaski county, and contained in the tax book of said county for the year A. D. 1839, purporting to be a tax upon the privilege of keeping two billiard tables, is unauthorized by law, and for this reason the same ought to be, and hereby is, forever superseded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF ARKANSAS,
In July Term, A. D. 1840, being the sixty-fourth year of
our Independence.

LORENZO GIBSON against THE COUNTY OF PULASKI.

CERTIORARI to the County Court of Pulaski.

The right of keeping a stallion is strictly and emphatically a common right, not derived from, or enjoyed by virtue of, any grant from the Government; nor is it enjoyed by part, and denied to others, of the community. Consequently it cannot be metamorphosed into a privilege, subject to taxation as such. That provision of the statute of Nov. 7, 1836, which provides for levying a tax, for the privilege of keeping a stallion, is unconstitutional.

The plaintiff presented his petition to one of the Judges of the Supreme Court, in vacation, to be relieved from the payment of a sum of money with which he stood charged on the tax book of Pulaski county, for the year 1838, as a county tax imposed on him for the privilege of keeping a stallion, or stud-horse, and thereupon, according to the prayer of his petition, obtained a writ of supersedeas, suspending the collection thereof until the matter could be heard in the Supreme Court; and also, a writ of *certiorari* addressed to the County Court of the county, commanding it to certify, and send to this court, a transcript of the assessment list, and tax book of the county for the year 1838, together with orders made, and proceedings had, touching the

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adjustment of the tax book; and the imposition of county taxes for that year, by the County Court; and also the proceedings and adjudication of the County Court, on the motion of Gibson, made at the April term, A. D. 1839, to be discharged from the payment of such tax; which writs were issued, and returned.

The return to the writ of *certiorari* showed that the plaintiff's name, without any thing whatever taxable annexed to it, stood upon the assessment list; but that he was charged on the tax book, purporting to be founded on and made out from said list, with several things subjected to taxation by statute, among which was one stallion, standing per season at \$50. It also appeared that the County Court, at the January term thereof, 1838, imposed a tax on the privilege of keeping each stallion, equal to the sum for which such stud horse should stand for the season; and that the plaintiff was charged on the list placed in the hands of the Sheriff for collection, with the sum of \$50 as a county tax for the privilege of keeping one stallion; that he moved the County Court at the April term thereof, A. D. 1839, to discharge him from said tax, on the ground that the same was levied as upon a privilege, contrary to the Constitution, but the court, on consideration thereof, overruled said motion. The return also shows that the Sheriff had paid into the county treasury the whole amount of county taxes charged and contained in the tax book for the year 1838.

TRAPNALL & COCKE, for the petitioner:

The only question which we mean to present to the consideration of the court respects the constitutionality of the act of the Legislature authorizing the imposition of this tax. The second section of the Constitution, under the head of revenue, declares "that all property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the General Assembly shall direct; making the same equal and uniform throughout the State. No one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value; provided, the the General Assembly shall have power to tax merchants, hawkers, pedlars, and privileges, in such manner as may from time to time be prescribed by law."

The constitutionality of this law can only be sustained by showing that the right to keep and stand a stallion is a privilege in the legal constitutional sense of this term. To show conclusively, that it is not, we refer the court to *Jacobs Law Dic. vol. 5, title privilege, 287; the People vs. Utica Ins. Co., 15 J. R. 387; 7 Com. Dig. privilege, 113; 3 Jacobs. Law. Dic. Franchise, 122.*

CLENDENIN, *Contra* :

By the act of the General Assembly, passed 1836, the County Court is authorized to assess a tax upon "each stallion or jack equal to the sum for which such stud horse or jack shall stand for the season. See *Laws of 1836, p. 189.* Under this act the County Court of Pulaski county assessed upon L. Gibson the sum of fifty dollars for the year 1838, as a tax upon him for the *privilege* of keeping a stud horse, for whose services he charged the said sum; and the plaintiff in error objecting to said tax as one not authorized by the Constitution, prosecutes his appeal to this court.

By the second section of the Constitution, on the subject of revenue, it is declared "that all property subject to taxation, shall be taxed according to its value; that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than another species of property of equal value; provided, that the General Assembly shall have power to tax merchants, hawkers, pedlers, and *privileges* in such manner as may from time to time be prescribed by law." By this section of the Constitution it will be perceived that the General Assembly have the power to tax *privileges* in such manner as they may prescribe; and the only question, therefore, that arises in this case, is whether the keeping of a stud horse, as described by the statute, is a privilege, as meant by the Constitution. The term privilege as used in the English laws and authorities seems to apply exclusively to certain personal advantages, which individuals obtained in preference to those not so much favored, and which owing to the more liberal formation of our government, seems to have become entirely obsolete, and in their place our laws and customs have adopted, (and grant,) *privi-*

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leges of a more general character, and by which the public good is more immediately advanced; such, as for instance, the *privilege* of keeping a ferry, or of charging toll on a bridge, of banking and issuing bank notes, and others of the same character, in all of which the public interest seems to be consulted.

To more clearly understand the term and word *privilege*, as used in our Constitution, we will be compelled to seek the word and its application. "Privilege" is defined by Webster to be, "a particular and peculiar benefit or advantage enjoyed by a person, company, or society, beyond the common advantages of other citizens. 2d. Any peculiar benefit or advantage, right or immunity, not common to others of the human family. 3d. Advantage, favor, benefit;" and it is further defined, "to grant some particular right or exemption to, to invest with a peculiar right or immunity."

In construing a statute, and applying the meaning to words doubtful, the courts will always give to those words their common and most generally received interpretation and meaning. And, in this case, it is for the court to say whether the keeping a stallion and charging for his services a certain amount, is such a *privilege* as is meant by the Constitution, and upon which the General Assembly had the power to assess other than a tax equal to the value of the property.

It is urged that in cases like the present it is not the stallion or property which is taxed; but the particular and peculiar benefit and advantage enjoyed by the owner, which is taxed, a right to charge for the services of his stallion, a *privilege* which no other individual is entitled to without paying a like tax for his *privilege*, therefore, it is a favor and a peculiar right or immunity. If this is a proper construction to put upon the section of the Constitution already referred to, undoubtedly the General Assembly had the power to say what tax the citizen should pay for this peculiar immunity and benefit, this *privilege*; and the County Court had a right to assess the tax, and their officer, the Sheriff, authority to collect it.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The plaintiff expressly waives all objections to such discrepancies and irregularities, as are shown by the return of the County Court,

and submits the single question, whether the keeping of a stud horse is a privilege embraced by the Constitution which may be taxed as such.

The attorney representing the county is also understood to rest the case solely upon the validity of the act of the Legislature, approved November 7th, 1836, in pursuance of a provision contained in the third section of which the tax in question is imposed. The section enacts "that in order to raise a revenue for county purposes in addition to the sums arising from tavern, grocery and ferry licenses, the county courts of the respective counties in this State shall have power to levy a tax of not exceeding fifty cents of each and every free male inhabitant, between the age of one and fifty years, residing in their respective counties; and for the privilege of keeping each stallion or jack, a tax equal to the amount for which every such stud horse, or jack, shall stand for the season; and a tax on the value of all property made taxable by the first section of this act not exceeding one-fourth of one per cent. on the nett value thereof; which taxes shall be levied and collected in the same manner as State taxes are, and paid over to the County Treasurers of the respective counties." *Acts 1836, p. 189.* The first section of this act subjects "all horses, mules, jack, jennies, and neat cattle of whatsoever kind, or description, above three years old," to taxation; and therefore, according to the express letter of the section above quoted, the county court may levy on stud horses, a tax *ad valorem*, in addition to the price for which he stands for the season; though in the present instance, such charge does not appear to have been made. Yet if the keeping of a stud horse may be taxed as a privilege, the act in question warrants it. But how is the keeping of a stallion metamorphosed into a privilege? It certainly is not a right derived from, or enjoyed by virtue of, any grant from the government; nor is it enjoyed by part, and denied to others of the community. It is a right which, under our political organization, may be enjoyed as perfectly without, as with the aid of a grant from the Legislature. It is strictly and emphatically a common right, which cannot be denied, though it may be so restricted and regulated by law, as to prevent injury to others, as well as improper, obscene, or offensive exhibitions of such beasts, but such laws can only be enforced by the infliction of

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penalties and punishments on those who violate such legal restrictions or regulations. Besides which, stallions are unquestionably property, within any legal definition of the term, and as such, every person in this State has the absolute right of acquiring and keeping them. *Const. Ark., Art. II, Sec. 1.* And this is a right of which no one can be deprived by any act of the Legislature, and therefore, as the right is absolute, and enjoyed by all, and none can be deprived of its benefits, it cannot by possibility be created a privilege to be enjoyed by a portion of the community only. This principle is also asserted and enforced in the case of *Stevens and Woods vs. the State, ante p. 291.* We are therefore of the opinion, that so much of the 3rd section of the Statute, approved Nov. 7, 1836, as purports to authorize a tax to be levied "for the privilege of keeping each stallion," is in conflict with, and repugnant to the Constitution of this State, and void, and the tax with which the plaintiff is charged, in pursuance of said provision, on the tax book of the county of Pulaski, for the year A. D. 1838, is wholly unauthorized by law, and the judgment of the County Court directing it to be levied is illegal, and ought to be, and the same is hereby quashed, and set aside with costs, and the collection thereof perpetually superseded.

But to prevent any misunderstanding, or misapplication of the principles asserted and decided in this case, as well as the case of *Stevens and Woods*, above cited, it may not be improper, before we dismiss this subject, to remark, that the court has not intended to decide, or in fact decided, whether the taxes levied for county purposes, must be *ad valorem*, and equal and uniform throughout the State, or may be otherwise in the discretion of those to whom the power of prescribing such taxes is confided, or what property, or things, may be constitutionally taxed. These are, in the opinion of this court, important questions, not necessarily involved in either case, in relation to which the court has not designed either to express, or intimate any opinion.

JASON C. WILSON *against* GRANDISON D. ROYSTON.ERROR to *Hempstead Circuit Court.*

In replevin, the plea of *non cepit* admits the property of the slaves or other property replevied, to be in the plaintiff, and that he was previously in possession.

The plea of *non cepit* puts in issue nothing but the caption; and the place where that is material: and, under it the defendant cannot show property out of the plaintiff.

And where *non cepit* is pleaded, together with a plea of property in a third person, and not in the plaintiff, the pleadings narrow the case to the taking of the goods, and whose property they were at the time of the caption.

A plaintiff, who has a general or special property of goods, coupled with possession, either actual or constructive, can maintain replevin: and it was error to instruct the jury that a plaintiff must have had actual possession to enable him to maintain replevin.

A deed of trust acknowledged before a Notary Public in Louisiana, and subscribed in the presence of two witnesses, whose names and attestations were affixed to it; authenticated by the Notary Public, with the certificate of the Governor of Louisiana annexed, showing that the Notary Public was duly commissioned and in office at the time; is not so authenticated as that it can be read in evidence in this State without other proof of its execution.

To prove the execution of a deed, the testimony of the subscribing witnesses cannot be dispensed with, unless it be first shown that they are dead or interested, or have become infamous; or that their names are fictitious; or unless a more diligent search be made for them, and they cannot be found or heard of; or they are out of reach of the process of the court.

When these facts are proved, the next best evidence is by proving the handwriting of attesting witnesses.

And if the hand writing of the witnesses cannot be proved, after proper diligence for that purpose, then the hand writing of the obligor may be proved, but not before.

The hand writing of the subscribing witnesses must be proved, even where they have become incompetent since their attestation.

Therefore, where the whole showing is, that the witnesses sworn in the trial, stated, "that they had no knowledge of the subscribing witnesses to the deed; and that they had never known of their residing in this State;" this showing does not warrant the admission of the deed by proof of the hand writing of the obligor.

This was an action of replevin, brought by *Wilson* against *Royston* for certain negroes. The defendant pleaded *non cepit*, and property in himself and not in the plaintiff, and also gave notice that he would prove property in himself and one *Wynn*. The plaintiff joined issue to the plea of *non cepit*, and demurred to the second plea, which demurrer was overruled, and, as stated by the record, he then "joined issue 2nd plea."

The record is a meagre one, and very little was done by the plaintiff, in the court below, to present his case fairly before this court.

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Upon the trial the defendant offered in evidence a deed of trust from Wynn to himself, conveying the slaves in controversy, with others, to him in trust to secure the payment of certain debts, and authorizing him, upon Wynn's failure to pay any one of the debts when due, to take possession of and sell the negroes to pay such debts. The court refused to permit the deed to be read, as not being sufficiently authenticated, and the defendant then introduced two witnesses, who stated that they "had no knowledge of the subscribing witnesses to the deed, and had never known of their residing in this State." Upon this the court below permitted the hand writing of Wynn, the grantor, to be proved, and upon the proof thereof the deed was read to the jury.

Nothing more appears upon the record, in regard to the evidence in the case.

Instructions were asked on both sides, but it is not necessary to refer to all the instructions refused or given.

The court refused to instruct the jury, on motion of the plaintiff, that the plea of *non cepit* admitted the property and possession of the slaves to have been in the plaintiff—and instructed them, that if the defendant did not take the slaves out of the possession of the plaintiff, the jury must find for the defendant; that the plaintiff must have been in the *actual* and *lawful* possession of the slaves, to entitle him to recover; and that if they found for the defendant, they would find for him all the damages by him sustained from the date of the writ to the time of verdict.

The jury found the slaves to be the property of the defendant, and that he was entitled to the possession of them, and assessed the damages for loss of use of the slaves by the suing out of the writ to fifteen hundred dollars.

The plaintiff then moved for a new trial, and his motion was overruled.

PIKE, for plaintiff in error:

We contend, 1st. That the deed from Wynn to Royston was not sufficiently proved to admit it to go to as evidence to the jury:

In *Johnson vs. Mason*, 1 *Esp.*, 89, when a person who executed a

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deed as attorney for another was asked in court if he executed the deed, and the question was objected to, until the deed was proved by the subscribing witness. Lord Kenyon sustained the objection, and said that Lord Mansfield had once by surprise, allowed a man to acknowledge his own deed in court, without calling the subscribing witness, but that he afterwards changed his opinion, and held that a party should not be allowed to acknowledge his own deed in court, until it had been proved by the subscribing witness.

So in *Abbott vs. Plumbe*, Doug. 216, Lord Mansfield said, "to be sure this is a captious objection; but it is a technical rule, that the subscribing witness must be produced." This rule was also recognized in *Barnes vs. Trompousky*, 7 T. R., 261, by Lawrence J., and in the same case, Grose J., also said, "where there is a subscribing witness, the parties thereby agree that the proof of their hand writing shall be made through that medium." The same rule was recognized in *Call vs. Dunning*, 4 East. 53; in *Leith vs. Post*, 1 Esp. 196; in *Cunliffe vs. Sefton*, 2 East, 183; in *Laing vs. Raine*, 2 Bos. and Pul. 85; and the Supreme Court of New-York, in *Shuby vs. Champlin*, 4 J. R. 461, and *Fox vs. Kiel*, 3 J. R. 477, has without qualification admitted it to be the law. And see 1 Phil. Ev. 412. And both these cases were subsequent to the case of *Hall vs. Phelps*, 2 J. R. 451, in which C. J. Spencer argued against the English rule, and decided that the execution of a note might be proved by the admission of the promisor. Chancellor Kent, in *Fox vs. Kiel*, 3 J. R. 477, refused to recognize the reasoning of C. J. Spencer, as applied to a deed or bond.

But admitting that a deed may, under certain circumstances, be proven by identifying the grantor's hand writing, do the authorities warrant that kind of proof, under such circumstances as are exhibited in this case? We think not.

The case of *Barnes vs. Trompousky* in K. B., 7 T. R. 261, is very strongly in point. A charter party was offered in evidence, signed by the name of the defendant, and attested by one Knieviem, whose seal, as a sworn broker, was attached to the instrument. A merchant living in Hull, long conversant in the Russian trade, and in the habit of corresponding with the defendant, proved the signature to the char-

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ter party to be his, and also proved that eight years before, a sworn broker named Knieviem was living at Riga, and that he had not heard of his death; and another witness proved that Knieviem was acting there as a broker seven years before; but neither of the witnesses knew his hand writing. Upon this state of case the charter party was read to the jury below, but in *K. B.* Lord Kenyon said, "We ought not to suffer this point to be called in question. It is too clear for discussion. I do not say that proof of the hand writing of the contracting party is not, under any circumstances, sufficient, when there is a subscribing witness, as if no intelligence can be obtained respecting the subscribing witness after reasonable inquiry has been made; but here the witness is a known person residing in Riga." And he further laid down the rule to be, that instruments of writing which are witnessed, must be proven "regularly, by the witness, if living; if dead, by proving his hand writing; if residing abroad, by sending out a commission to examine him, or at least, by proving his hand writing; which last, indeed, is a relaxation of the old rule, and admitted only of late years." "The same medium of proof has also been admitted, where the subscribing witness has been sought for, and could not be found, so as to furnish a presumption that he was dead. But the rule has never been relaxed further than these instances; and there is neither necessity nor convenience in doing so."

So in *Call vs. Dunning*, 4 *East*. 53, and *S. C.* in 5 *Esp.* 16, where the only proof offered of the execution of a bond, to which there was a subscribing witness, was the defendant's answer to a bill in chancery, in which he admitted the bond to be his deed, Lord Ellenborough said that "the case fell within the common rule; that the answer in chancery was only secondary evidence; and not admissible, because the plaintiff had not laid a foundation for letting it in, by shewing that he had made inquiry after the subscribing witness, and had not been able, with due diligence, to procure any account of him."

So in the present case, the only ground on which the handwriting of the grantor was allowed to be proved, was, that two witnesses testified that they did not know any such persons as the subscribing witnesses, nor that they resided in this State. How easy it would be to procure

such testimony as this, and how far it is from complying with the rule, the court cannot but see; and it does not even conduce to prove any diligence whatever on the part of the defendant in this case. He issued no subpoena for the subscribing witness, and asked no commission to take their testimony—but upon the meagre showing which he made, he proved the deed by the statement of a witness, that he “believed” the signature to be Wynn’s—a kind of testimony always regarded with suspicion, and only allowed to be resorted to in extreme emergencies.

The whole law upon this subject is distinctly laid down in *McPherson vs. Rathbone*, 11 Wend. 98. There the court said that “where a sealed instrument is attested by a subscribing witness, the testimony of such witness is the best evidence of its execution. If the subscribing witness is not produced, his absence must be sufficiently accounted for; as that he is dead, or cannot be found on sufficient inquiry; or that he resides out of the State, and is beyond the reach of the process of the court. In such case, proof of the hand writing of the subscribing witness, proves the execution of the instrument.” The court then goes on to say, that “if the hand writing of the subscribing witness cannot be proved, after proper diligence has been used for that purpose, the party must then resort to the same testimony as if there had been no subscribing witness;” and may then prove the hand writing of the obligor or grantor. That this is the correct doctrine there can be no doubt. In the present case, no attempt even, was made to prove the hand writing of the subscribing witnesses. Many cases will be found, where evidence of the hand writing of the witness has been received; but no one case will be found, in an English court, or any American one, so far as we have examined, where proof of the hand writing of the grantor or obligor has been received, without an attempt to prove the hand writing of the witness. See *Adams vs. Kerr*, 1 Bos. and Pul. 360; *Barnes vs. Trompousky*, 7 T. R. 262; *Mott vs. Doughty*, 1 John’s Cas. 230; *Cunliffe vs. Sefton*, 2 East. 183; *Swire vs. Bell*, 5 T. R. 371; *Godfrey vs. Norris*, 1 Str. 34; *Wood vs. Drury* 1 Ld. Raym. 734; *Prince vs. Blackburn*, 2 East. 250; *Coghlan vs. Williamson*, Doug. 95; *Jones vs. Mason*, 2 Str. 833; *Goss vs. Tracy*, 1 P. Wm’s. 289. These cases shew that the hand writing of the witness

may be proved, even where he himself has become an incompetent witness.

So in *Pelletreau vs. Jackson*, 11 Wend. 123, the cases are stated in which the execution of a deed may be proved, by proving the hand writing of the party, or his admission that he executed it. They are laid down to be, "where there is no witness—where the witness denies having any knowledge of the execution—where the name of the witness is fictitious—where he is interested or infamous—where he is dead or out of the jurisdiction of the court—and after diligent inquiry no proof of his hand writing can be made—or where, upon the like inquiry, nothing can be heard of him, so that he can neither be produced, nor his hand writing proved;" and it is declared that these qualifications of the general principle are in accordance with the general rule; that the best evidence must be produced, of which the nature and state of the case will admit. In that case, one witness stated that he had made faithful inquiries for the subscribing witness in New-York and Brooklyn; that he had made diligent search for her, and could not find her; that he had found one person who knew her, and had heard of others who had heard of her. Another witness stated that he had known the subscribing witness 24 or 25 years before, and had not heard of her since. Of this evidence, upon which the hand writing of the party was permitted in the court below to be proven, the Supreme Court of New-York said, after the remarks we have already quoted, that "sufficient diligence was shown in the inquiry after the subscribing witness, to let in the secondary evidence, that is, proof of her hand writing; but it fell short of what the court should have required, in order to justify an entire disregard of the fact, that there was a subscribing witness to the instrument, in the proof of the execution of it. The same diligence should be exacted in endeavoring to prove the hand writing, that is required in the endeavor to find and procure the personal attendance of the witness; at least, before the third degree of evidence is admitted, to wit, the hand writing of the party." And the court further said, that they would not presume that any attempt was made to prove the hand writing of the witness. See also *Jackson vs. Gager*, 5 Cowen, 383.

The case of *Pelletreau vs. Jackson* went up to the Court of Errors of

New-York, and was affirmed. See *Jackson vs. Waldron*, 13 Wend. 196. The opinion of Senator Tracy, in that case, which was sustained by the court, is conclusive; and this court is respectfully referred to it, as developing and successfully vindicating the rule, that proof of the hand writing of the witness, is higher in nature, and safer and more satisfactory, than the proof of the hand writing of the obligor or grantor; and that there must be as much proof of a *diligent and bona fide search* for proof of the hand writing of the witness, as for the witness himself; and further, that proof that the subscribing witness cannot be found is no proof that his hand writing cannot be proved.

2nd. We contend that there was no such issue on the second plea as would warrant a verdict; and that the verdict given assumes to respond to an issue which could not have been made in this case. The material fact in dispute, and substantial issue, raised on all pleas of property in replevin, is *property in the plaintiff*. The replication must take issue on that fact, and the rights of the parties must depend on the determination of it, the plea of *non cepit* being out of the question. And in every such plea of property, the defendant *must traverse* property in the plaintiff. The title to the property, stated in the plea, is matter of inducement. The traverse is indispensable. *Rogers vs. Arnold*, 12 Wend. 34; *Harris vs. Paynes*, 5 Litt. 10 7.

Where there is such a traverse, (and in this case there is an informal one,) the allegation of property in the defendant being the inducement, *issue cannot be taken* on that allegation. *Bemus vs. Beekman*, 3 Wend. 672; *Lady Chichesly vs. Thomson*, Cro. Cas. 104.

Where there is such a plea, containing a traverse, the plea concludes with a verification, as in this case; and in order to arrive at an issue, there must be a replication re-affirming property in the plaintiff, and on that the issue is made up; and the question is whether the property replevied was the property of the plaintiff. *Bemus vs. Beekman*, 3 Wend. 672; *Gould's Pl.* 376, 381, 382; *Bac. Abr. Pleas, &c. H. 1.*

The only issue, therefore, which could have been made upon the second plea in this case, was, whether the property was or was not the property of the plaintiff. The verdict is not responsive to this

issue; but finds another matter, which could only be indirectly involved in this issue.

Was any issue made up? It is laid down in *Morris vs. Barkley*, 1 Litt. 66, that a similar to the plea of the statute of limitations forms no issue. And see *Elliott vs. Fowler*, 1 Litt. 204; *Guthrie vs. Wickliffe*, 3 Bibb 81; and *Phillips vs. Tibbats*, 3 Marsh. 16.

3rd. We contend that the court below erred in refusing to instruct the jury, that the plea of *non cepit* admitted property and possession in the plaintiff; and instructing them that in order to enable the plaintiff to recover, he must have been in the *actual* and lawful possession of the property.

We shall find no difficulty in showing: First, that *non cepit* admits both property and possession; and second, that *actual* possession is not necessary to maintain replevin.

The whole law on the first point, will be found laid down in *Rogers vs. Arnold*, 12 Wend. 33. It is there stated that the plea of *non cepit* puts nothing in issue but the caption, except the place, when that is material, and that under it, the defendant cannot show property out of the plaintiff.

This case is sustained by *McFarland vs. Barker*, 1 Mass. 152; and in *Seymore vs. Billings*, 12 Wend. 286, the rule is again stated to be, that the plea of *non cepit* involves merely the fact of *taking*, and the *place*, and not the title to the property.

So in *D'Wolf vs. Harris*, 4 Mason 528, where *non cepit* was pleaded, and for a second plea property in a third person and not in the plaintiff, and that the goods were attached by defendant, as the property of that third person; Story, J. said that "the pleadings narrow down the case to the taking of the goods, and whose property they were at the time of attachment."

So in *McKenley vs. McGregor*, 3 Wharton 393, the Supreme Court of Pennsylvania said, that by the plea of *non cepit*, the defendant disclaims property in the goods, and admits upon record, that property is in the plaintiff. By the plea of *non cepit*, they add, the caption and detention only are put in issue, and the right of property can only be put in issue by a special plea. See also, *Gilb. on Rep.* 165; *Wilkinson on Rep.* 50; *Harper vs. Barker*, 3 Mon. 421.

On the second point, that *actual* possession is not necessary to enable the plaintiff to maintain replevin, the authorities are perfectly unanimous and conclusive.

In *D'Wolf vs. Harris*, 4 *Mason* 529, Story J. lays the rule down to be, that property in the goods, together with an *actual* or *constructive* possession of them, is sufficient to maintain replevin, and decided, that an assignment of goods at sea, and their *proceeds*, if *bona fide*, is sufficient to pass the legal title to the goods, and also to the *proceeds* so that replevin will lie for the latter.

Since the case of *Pangburn vs. Patridge*, 7 *J. R.* 142, it has been settled that replevin will lie, where trespass *de bonis asportatis* will lie. The plaintiff must have property general or special, and possession either actual or constructive. And see *Ward vs. Macauley*, 4 *T. R.* 489; *Gorden vs. Harper*, 7 *T. R.* 9; *Putnam vs. Wyley* 8 *J. R.* 432. And the plaintiff having the property, has also the constructive possession, for the property draws to it the possession. *Marshall vs. Davis*, 1 *Wend.* 109; *Hall vs. Tuttle*, 2 *Wend.* 475; *Dunham vs. Wyckoff*, 3 *Wend.* 281; *Thompson vs. Button*, 14 *J. R.* 84; *Chinn vs. Russell*, 2 *Blackf.* 174.

So in *Wheeler vs. Train*, 3 *Pick.* 257, it is laid down that replevin and trover depend on the same principles, and that to maintain either, the plaintiff need only have the right of property, including the right of possession, at the time of taking, or at the time of suing out the writ. And see to same point, *Keeley vs. Hume* 3 *Mon.* 184.

4th. We contend that the court below improperly instructed the jury that they should assess for the defendant all damages sustained from the date of the writ to the time of the verdict. The damages could only have been assessed from the replevying the property till time of verdict.

TRIMBLE, and TRAFNALL & COCKE, *Contra*:

The second plea was good. See *Digest*, title *Replevin*, sec. 2; 12 *Wend.* 32; 10 *Wend.* 629.

The first question is, did the court rightly admit the deed of trust in the plaintiff's bill of exceptions, to go to the jury. The deed was first offered as an authenticated deed, but on that ground rejected, to

which the defendant excepted. This deed was then admitted as evidence, on proof of the hand writing of W. Wynn. If the deed was rightfully admitted to go to the jury it makes no difference on what ground it was admitted. This deed ought to have been admitted as evidence as an authenticated deed. See *Revised Statutes, (Authentication,)* p. 55, sec. 1; *same, (Conveyance of Real Estate,)* p. 190, sec. 14, and 16; p. 133, sec. 6.

The proof was sufficient to admit the deed, on the proof as taken in the record. 11 *Wend.* 123; *Digest, Conveyance* sec. 3; 1 *Starkie* 290, 1, 2, 3 and 4. The plea of *non cepit* is the general issue in replevin, and puts the plaintiff to the proof of the allegations in the declaration. *Bacon Abr. replevin, and Avowry, (J.)* This plea when pleaded alone admits property in the plaintiff, but does not admit possession in the plaintiff; when this plea is accompanied with the plea of property in defendant, it does not admit property or possession in plaintiff. *Comyns' Digest title Repl.* 917; 7 *J. R.* 140; 17 *J. R.* 116; 10 *Wend.* 629; 12 *Wend.* 32.

The first and second instructions asked by the defendant, are, that if the possession of the property was not in the plaintiff at the time of the supposed taking, he cannot have a verdict, that is, the jury ought to find for the defendant. The declaration is founded on a supposed taking from the plaintiff by the defendant, he must show that he had the possession, and that the defendant took the property from him, as in trespass *de bonis asportatis*, in conformity to the rule that the proof must conform to the allegations. See *Digest* 457. The possession must be in the plaintiff, and that possession must be lawful. See *Dig.* 457. "In all cases where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof," &c. 7 *J. R.* 140; 17 *J. R.* 116; 10 *Wend.* 629; 12 *Wend.* 32.

The third instruction asked by defendant is supported by the second section of the act under which the action is brought. See *Dig.* 458.

The fourth instruction is that if the defendant had a general or a special property with a right to immediate possession, the jury ought to find for defendant. 2 *Stark. title replevin*; 12 *Wend.* 32.

The fifth instruction is that the right to present property draws to it the right of possession.

The sixth instruction is supported by the second section of the act concerning replevin. *Dig.* 458; *Rev. Stat.*, sec. 43 and 44, p. 666.

The counsel for the defendant further suggest that the instructions are not incorporated in the bill of exceptions, or made a part of the record; nor is there any evidence that the deed of trust was all the evidence in favor of the defendant, and therefore the record does not show any error in the judgment of the court below. And the exception of the plaintiff to the judgment of the court, admitting the deed of trust to go to the jury, does not say that it contains all the testimony upon the subject, nor does it say that the defendant did not prove the hand writing of the subscribing witnesses, as well as the maker of the deed, (Wynn.) See *Nations vs. Gray*, 1 *Ark.* 557.

LACY, *Judge*, delivered the opinion of the court:

The first question presented is, whether the Circuit Court erred in refusing to instruct the jury, on the plaintiff's motion, that the defendant's plea of *non cepit* admitted the property and possession of the slaves in controversy, to be in the plaintiff at the time of the taking alleged in the declaration. The doctrine in regard to the law of replevin on the plea of *non cepit* is accurately laid down in the case of *Rogers vs. Arnold*, 12 *Wendell*, 33. It is there stated "that the plea of *non cepit* puts in issue nothing but the caption, and the place, where that is material, and that under it the defendant cannot show property out of the plaintiff." And in the case of *D'Wolf vs. Harris*, 4 *Mason*, 528; Justice Story has said, "where *non cepit* was pleaded, and property in a third person, and not in the plaintiff, that the pleadings narrow the case to the taking of the goods, and whose property they were at the time of the attachment." 7 *John. Rep.* 142, *Pangburn vs. Patridge*.

The plea of *non cepit* does, in effect, disclaim property and possession to be in the plaintiff. If this be correct, then the court below certainly erred in refusing to give the instructions asked for by the plaintiff. He may have wholly failed in his action on account of the misdirection given to the jury; at any rate, it is but reasonable to sup-

pose that his interest was severely prejudiced by it; for it was all important for him to show property and possession in himself; and as that fact was expressly admitted by the pleading, he could not be required to prove it.

The second point to be considered and decided, is, did the court below err in instructing the jury that in order to entitle the plaintiff to maintain replevin, it was necessary for him to prove an actual and lawful possession of the property claimed. It is true, that the plaintiff must show a general or special property in the goods to support his action, or recover in replevin, coupled with an actual or constructive possession of them at the time of suing out the writ. The right of property, by intendment or operation of law, carries with it the right of possession, either actual or constructive. Upon this principle, it has been held that the assignment of goods at sea, and of their proceeds, if *bona fide*, is sufficient to pass the legal title to the goods, and also to the proceeds, so that replevin will lie for the latter. The authorities are so full and conclusive on this point, that it is deemed unnecessary to say more on this branch of the subject, than barely to refer to some of the most prominent cases that have been decided. The principle is well settled that a plaintiff who has a general or special property in the goods, coupled with an actual or constructive possession, can maintain replevin. It is the unlawful taking or deprivation of the goods that constitutes the gist of the action; and this taking may be from him who is legally entitled to the property or proceeds of the goods, as well as from him who has the actual possession of them. This being the case, it necessarily follows, that the court below erred in instructing the jury that the plaintiff must have had the actual possession of the property in controversy, in order to enable him to maintain replevin.

The only remaining question to be decided is, did the Circuit Court err in permitting the deed of trust from *William Wynn* to *Grandison D. Royston* to be read as evidence on the trial, upon proof of the hand writing of the grantor, without properly accounting for the absence of the subscribing witnesses thereto, or without proving the hand writing of the attesting witnesses.

It is a universal rule of practice, without an exception, that the best evidence which the nature and state of the case will admit of, must

be produced. This rule is founded on the most obvious principles of necessity, and of public policy; and it cannot be departed from without manifest injustice, and producing the greatest confusion and uncertainty in all judicial proceedings. It lies at the very foundation of all correct reasoning and induction, and it constitutes the basis and ground work of the law of evidence. Primary evidence stands highest in the scale or grade of proof, because it approaches nearest to the truth of the fact sought to be proved; and for this reason is more conclusive in its results, and less liable to mistake or deception; and wherever the best evidence exists, or can be obtained, it must be resorted to as furnishing the only legitimate and the most unerring test of truth.

To admit secondary evidence, while a higher grade of testimony exists, or can be procured, is to violate a universal principle of the law of evidence, and to destroy at the same time the only fair and legitimate mode of reasoning upon all subjects. The party who seeks to prove a given fact, by inferior evidence, must first lay a just ground for its introduction, by showing that the superior evidence has been lost or destroyed, or that it is not within his power to obtain it, or that it is not within the reach of the process of the court.

For to allow a party the privilege of resorting to secondary evidence while primary testimony exists, or can be had, would be to enable him to commit a fraud, and to obscure and render doubtful the issue to be proved. By keeping in view these plain and obvious principles we shall find little or no difficulty in solving the questions now before us. The plaintiff objected to the deed of trust, in the first place, as inadmissible testimony, for the want of proper authentication. The court sustained the objection, and the defendant thereupon introduced two witnesses who stated, "they had no knowledge of the subscribing witnesses to the deed, and had never known of their residing in this State." The record shows that the deed was duly acknowledged before a Notary Public, in the city of New-Orleans, and that it was subscribed in the presence of two witnesses, whose names and attestations were affixed to it. Upon this state of the case, the court below permitted the hand writing of William Wynn, the grantor, to be

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proved, and upon proof thereof, the deed was declared duly executed and allowed to be read as evidence to the jury.

The record shows that the defendant claimed title to the property in question under and by virtue of the deed of trust executed by Wynn to himself. It is acknowledged before a Notary Public with his authentication attached to it, to which is annexed a certificate of the Governor of Louisiana, showing that the Notary Public was duly commissioned and in office at the time he affixed his official signature to the instrument. See *Revised Statutes of the State of Arkansas*, 53.

This cannot be considered as a judicial record of another State, and it is certainly not entitled to be read as evidence in this State, simply on the authentication of a Notary Public of New Orleans. It must then be proved as other deeds of equal grade and dignity are required to be. The law places the subscribing witnesses around the transaction for the sole purpose of proving it, and their testimony cannot be dispensed with, unless it be first shown that they are dead, or interested, or have become infamous since the subscribing of it, or unless a most diligent search be made for them, and they cannot be found or heard of; or they are out of the reach of the process of the court. When these facts are proved, then the law dispenses with the best evidence that the case will admit of, and allows secondary evidence to be introduced, by proving the hand writing of the attesting witnesses. In such cases, proof of the hand writing of the witnesses proves the execution of the instrument. And if the hand writing of the witnesses cannot be proved, after proper diligence has been used for that purpose, the party may then resort to a third grade of evidence, and prove the hand writing of the obligor or grantor, as if there had been no subscribing witnesses. *Johnson vs. Mason*, 1 *Exp.* 69; *Abbot vs. Plumbe*, *Doug.* 216; *Barnes vs. Trompousky*, 7 *J. R.* 261; *Call vs. Dunning*, 4 *East.* 253; *Fox vs. Kiel*, 3 *J. R.* 477; *McPherson vs. Rathbone*, 11 *Wendell*, 98. The authorities show that the hand writing of the subscribing witnesses, even when they have become incompetent since their attestation, must be proved. And in *Patterson vs. Jackson*, 11 *Wendell*, 123, the cases are enumerated in which the execution of a deed may be proved by establishing the hand writing of a party, or by admitting that he executed it. They

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consist of these: where a witness is interested, or infamous, where he denies having any knowledge of its execution, where the name is fictitious, where there is no witness, where he is dead or out of the jurisdiction of the court, and where, after diligent inquiry, no proof of his hand writing can be made, and when, upon inquiry, nothing can be heard of him, so that he can neither be produced, nor his hand writing proved."

This enumeration includes all the cases where the hand writing of the grantor is allowed to be proved. It certainly cannot be contended that the defendant has brought himself within the rules here laid down. The witnesses to the deed are not shown to be dead, infamous, or interested, to deny having a knowledge of its execution, or to be fictitious personages, or out of the reach of the process of the court, nor is it shown, that after diligent inquiry, the defendant is unable to make any proof of their hand writing, or that nothing has been heard of them; so that they can neither be produced, nor their hand writing proved.

No attempt was ever made to prove the hand writing of the attesting witnesses, nor was any search or inquiry instituted for that purpose. No effort whatever was made to procure their attendance, or to obtain their testimony. The witnesses who were examined on the trial, simply stated "that they had no knowledge of the subscribing witnesses to the deed; and that they had never known of their residing in this State." No question, so far as the record shows, was ever asked them in regard to their knowledge of their hand writing. In the absence, therefore of all those requisites, which are held to be indispensable for introducing a third grade or species of evidence, to introduce the deed; the court below unquestionably erred in permitting the deed to be established by proving the hand writing of the grantor.

It has been already shown that the court erred in refusing the instructions asked for by the plaintiff, and in giving those asked for by the defendant, and also, in overruling the plaintiff's objection to the proof of the execution of the deed of trust; and this being the case, the court should have awarded the plaintiff a new trial, which was refused. This being the case, the judgment of the court below must be reversed.

ALBERT W. WEBB against JONES AND PRESCOTT.**ERROR to Chicot Circuit Court.**

The failure or omission of a non-resident plaintiff to file bond for costs before he instituted suit, is matter in abatement only: and if the defendant pleads in bar, the objection is waived.

No question upon a demurrer to a plea in abatement can be raised in this court, if, after demurrer sustained, the defendant pleaded in bar.

Where a petition in debt under the statute states the plaintiffs to be "the legal owners of a writing obligatory against Albert W. Webb," and sets out verbatim a writing obligatory signed "A. W. Webb," it is sufficient: and it is not necessary to aver that he signed it by his style, &c., of A. W. Webb.

This was an action instituted by *Prescott* and *Jones* against *Webb*, by petition and summons, in the Circuit Court of Chicot county. The petition stated that the plaintiffs were the legal owners of a bond against Albert W. Webb, and set out a bond, verbatim, signed "A. W. Webb." At the term to which the summons was returnable, the defendant below appeared, and moved the court to dismiss the suit, on the ground that no sufficient bond and security for costs had been filed by the plaintiffs before the commencement of the suit, as required by law, they being non-residents of this State; but his motion was overruled by the court. He then pleaded in abatement of the suit, the pendency of another action for the same cause, to which plea the plaintiffs demurred, and upon argument the demurrer was sustained, and the plea adjudged by the court insufficient to abate the suit. Whereupon, the defendant prayed oyer of the writing obligatory set forth in the petition, which was granted, and he thereupon demurred to the petition, and the plaintiffs joined in the demurrer, which upon argument was overruled by the court, and the petition adjudged sufficient; and the defendant not saying any thing further in bar of the action, final judgment was thereupon given in favor of the plaintiffs for the debt in the petition mentioned, with interest thereon as damages, at the rate of ten per cent. per annum from the sixteenth day of March, A. D. 1838, until the same should be paid, and all the costs of suit.

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TRAPNALL & COCKE, for plaintiff in error:

By the *Revised Code*, sec. 1, page 201, non-residents are required before they institute suit, to file in the office of the Clerk of the Circuit Court, in which the action is to be commenced, the obligation of some responsible person being a resident of this State, by which he shall acknowledge himself bound to pay all costs which may accrue in such action. The court will find that the bond filed in this case does not comply with the requirements of this law. It is a conditional obligation by which the obligor binds himself that Prescott and Jones will pay all costs which may accrue in said suit, and in the event of their failing to do so, that he will himself pay. Whereas, the statute requires an absolute and unconditional bond from some responsible person, a resident of this State. A statutory bond must pursue the statute, or it is fatally defective. *McDaniel vs. Sappington*, *Hardin's Rep.* 95.

The petition sets out that "Albert W. Webb" executed his note; and the note is signed by "A. W. Webb," and there is no alias dictus or averment that Albert W. Webb and A. W. Webb are the same person. For want therefore of sufficient legal certainty and identity, the court should have sustained the demurrer.

FOWLER, *Contra*:

The first question has already been settled during the present term, in the case of *Clark vs. Gibson*. And the right to raise said question here was waived below, both by a plea and a demurrer to the declaration.

The second question presented, to wit: that the demurrer to the declaration was improperly overruled, although not definitely settled by this court, is believed to be equally unavailing. This being a petitory action under the statute, enacted for the benefit of plaintiffs, in the collection of liquidated debts, and designed to strip legal proceedings, in such cases, of their unmeaning technicalities, should be liberally construed so as to carry into effect the intention of the Legislature. All the requisite averments, technically necessary in a declaration at common law, are contained, in substance, in a petition. The form of the petition is given in the statute, and the plaintiffs below literally complied with that form. But it may be contended that inasmuch as

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the writing was signed only with the initials of Webb's name, there should have been a distinct and specific averment in the petition that Albert W. Webb and A. W. Webb were one and the same person. We contend that if such averment be necessary, it is substantially and sufficiently made. The petition, in the language of the statute, expressly avers that the plaintiffs below were the legal owners of a writing obligatory "against the defendant Albert W. Webb," to the following effect; and then gives a copy of said writing obligatory, signed "A. W. Webb," making Albert W. Webb the same person as clearly as if it had charged that the said Albert W., by the name and description of A. W., made the writing obligatory. The demurrer to the declaration or petition was therefore properly overruled.

RINGO, *Chief Justice*, delivered the opinion of the Court:

In the cases of *Means vs. Cromwell and Guthrey*, 1 Ark. 247, and *Clark vs. Gibson* as well as some other cases, decided by this court, the failure or omission of a non-resident plaintiff, to file a bond with security for the costs of suit, before he institutes suit in the courts of this State, is held to be matter in abatement only, of which advantage may be taken in the course of the proceeding, at such time only, as of any other legal disability of the plaintiff to sue; but this, as well as every other matter in abatement, existing at the time of pleading to the action in bar thereof, is thereby waived, and the party cannot avail himself of it, either in this court, or the court below, and upon this principle the right of the plaintiff in error, to avail himself of any error in the judgment of the Circuit Court, in refusing to dismiss the suit, on his motion, for the want of a sufficient bond and security for costs, and adjudging his plea of *auter action pendant* insufficient in law to abate the suit, upon the demurrer of the defendants in error, must be denied. See *Dyer vs. Hatch*, 1 Ark. 339. And, therefore, as the plaintiff in error subsequently interposed a general demurrer to the petition, which according to the principle recognized by this court, in the case of *Clark vs. Gibson*, decided at the last term, must be regarded as a plea to the merits of the action, in bar thereof, he cannot now avail himself of any error in the adjudications of the Cir-

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cuit Court¹ in relation either to his motion to dismiss, or his plea in abatement.

The only question remaining to be decided, is whether the court below erred in overruling the demurrer to the petition, and pronouncing the final judgment thereupon. The petition conforms strictly to the form prescribed in the statute, and the writing shown upon oyer, corresponds in every particular, with the statement of it in the petition. The objection urged in support of the demurrer, is that there is no averment in the petition that the defendant Albert W. Webb is the same person who executed the obligation upon which the suit is founded, bearing the signature of A. W. Webb, only. This is rather a criticism upon the form prescribed by the statute than a substantial legal objection to the petition, which although it does not in express language contain any specific averment that the obligation therein set forth is the writing obligatory of the defendant, Webb, or that it was made or sealed by him, is a literal copy of the form prescribed by the statute, and explicitly states that the plaintiffs below "are the legal owners of a writing obligatory to the following effect," which is copied therein immediately after said statement; which, in our opinion, is substantially an averment that it his deed; for we cannot conceive how it can possibly be a writing obligatory against him, if he never executed, or sealed and delivered it as such. We are therefore of the opinion that the demurrer was rightly overruled. Wherefore the judgment of the Circuit Court is affirmed with costs.

GIBSON and MOORE, *Adm'rs*, against JOHN ROGERS.

ERROR to Crawford Circuit Court.

A writ of error *only* lies to bring up the record and proceedings of an inferior court, when such court proceeds according to the course of the common law. It therefore does not lie to reverse any final decision, order, or decree in chancery, rendered by the court below.

Under the Constitution and laws of this State, an erroneous decision of the Circuit Court, sitting in chancery, cannot be reached by a writ of error; but may be relieved against by a writ of certiorari, or an appeal regularly taken by the party aggrieved.

This was a suit in chancery, and was brought up by a writ of error. The defendant in error moved to dismiss, because no writ of error lay to a court of chancery.

PIKE, for the defendant in error.

WALKER, *Contra*.

LACY, *Judge*, delivered the opinion of the court:

At common law a writ of error was a matter of right, and issued of course out of chancery, to remove the record from an inferior to a superior court, (except in cases *coram nobis*,) with a commission to the Judges of the reversing tribunal to examine the proceedings, and to affirm or reverse the judgment according to law. 2 *Saund.* 100; 2 *Bac. Abr.* 448.

It lies where a person is aggrieved by an error in the foundation, proceeding, judgment or execution of a suit, and it is granted in all cases, proceeding agreeably to the course of common law in a court of record, except in cases of treason and felony. *Coke Litt.* 258, 289, *b.*; 2 *Bac. Abr.* title *Error A.* 1, 2; *Salk* 504. But when the court acts in a summary manner, or in a new course, different from the course of the common law, a *certiorari* and not a writ of error lies. 1 *Salk* 253; 1 *Ld. Raym.* 223, 252, 454; *Carth.* 494. And should the court, when the judgment was given, be not a court of record, the judgment can alone be reviewed by a superior court by virtue of a

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writ of false judgment. 2 *Sellon*, 410, 411, 423; *Tidd*, 1105, 1107; *Tidd's Forms*, 586, 600; *Went.* 2, 3, 271. This is the English doctrine, and the same principle is laid down and established by many of the American authorities, on the same subject. In *Melvin vs. Bridge*, 3 *Mass.* 304; *Commonwealth vs. Blue Hill Turnpike Corporation*, 5 *Mass.* 420; and *Commonwealth vs. Ellis*, 11 *Mass.* 465; it has been held that a writ of error does not lie where the proceedings are not according to the course of the common law; and so in the matter of *Negus*, 10 *Wend.* 39. Hence a writ of error would not lie on proceedings before a Justice of the Peace, under the militia law, nor for the purpose of removing a record from the decision of a Probate Court. *Pratt vs. Hall*, 4 *Mass.* 239; *Ball vs. Brigham*, 5 *Mass.* 406. Upon error, if the judgment complained of was rendered by a court below, proceeding according to the course of the common law, then a writ of error lay, and in case of reversal in the Superior Court, such judgment was entered up there, as ought to have been given by the court below. But if the court below proceeded in a manner different from the course of the common law, the only mode of correcting any error that might have occurred, was by *certiorari*, and as the Superior Court had not the same special cognizance over the premises, they only affirmed the proceeding if found to be regular, or quashed them for irregularity, if the court below exceeded its jurisdiction. The writ was not granted from the decisions or decrees of courts of chancery, agreeably to the English practice, because courts of chancery were not technically considered as courts of record. And for the still stronger additional reason, that courts of chancery did not proceed in their trial and adjudications according to the course of the common law, but in a manner wholly different from it. This doctrine is now considered as well settled in England, though there are to be found in some of the authorities, a few dicta controverting it. When there was an erroneous order or decree by an inferior court, seriously affecting the rights of the party complaining, it could be corrected and reversed before a superior jurisdiction; and besides this, an appeal lies from the higher courts of chancery to the house of Peers. 3 *Black. Com.* 56, 416, 407, 411; 6 *Comyn Plead.* 444; 37 *H.* 6, 14 *b*; 1 *Rolle*, 744, 1, 44. The principle may then be regarded as incontro-

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vertibly established, that a writ of error does not lie to review the record and proceedings of chancery cases from an inferior to a superior tribunal in England. We will now inquire whether, under our Constitution and Statutes, the writ will lie to remove chancery proceedings from the Circuit Courts into this court. The Constitution confers upon the Supreme Court the power to issue writs of error and other writs therein enumerated; and to hear and determine the same. It gives to it appellate jurisdiction only, except in cases otherwise directed by the grant, and it makes its jurisdiction co-extensive with the State, under such restrictions and regulations as may be prescribed by law. The sixth section of the fourth article declares "until the General Assembly shall deem it expedient to establish courts of chancery the Circuit Courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court. The Legislature, in obedience to this injunction have enacted that "if any person shall deem himself aggrieved by any final decision, order, or decree, of any court exercising chancery jurisdiction; and if any such person shall pray an appeal to the Supreme Court, during the term at which such decision, order, or decree is made, such appeal shall be granted in the same manner as appeals are granted at suits at law." *Rev. Stat., chap. 25, sec. 137, p. 174.* The Constitution, by giving to the Circuit Courts chancery jurisdiction, subject to an appeal to the Supreme Court, certainly conferred upon the parties an inchoate right of appeal, which the Legislature have rendered perfect, by prescribing the manner in which it shall be taken. The right of appeal is then a constitutional as well as a legislative remedy, conferred by affirmative words, which are to be taken and used in an exclusive sense; and this being the case, a writ of error cannot lie to remove the record in a chancery proceeding into this court. The Constitution and the Statutes, so far from authorizing or directing a writ of error in chancery cases, clearly forbid any such idea, by declaring that the right of appeal shall exist and remain inviolate; thereby asserting and affirming the rule of action adopted in the English courts. There is no legislative provision in express terms, or by necessary implication, that gives a writ of error in such cases; but upon the contrary, there is an express act giving the right of appeal, and imposing the conditions upon which it is grant-

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ed. The statute regulating the practice in this court, declares "that writs of error upon any final judgment, or decision of any Circuit Court, shall issue, of course, out of the Supreme Court in vacation, as well as in term time." *Rev. Stat. chap. 117, sec. 1, p. 641.* Neither the words of this act, or its obvious meaning or intention will extend its operation so as to include final orders or decrees in chancery. It clearly has reference to cases at common law, contradistinguished from chancery decisions, as the whole act taken together and in connection with the words "final judgment or decisions" conclusively proves. To place upon it any other construction, would be to change the whole mode of proceeding for reversing and correcting errors in the decisions of inferior courts of chancery; and it would also introduce an entirely different rule on the subject, contrary to the principles of the common law; which is never allowed, except by express and positive enactment. In the present instance it would be doing more. It would give a new and unusual remedy, without any legislative action, and that too in derogation of the authority of the Constitution. If these positions be true, then it unquestionably follows that a writ of error will not lie to bring up chancery cases from the decisions of Circuit Courts into this court; and, therefore, the writ of error is dismissed with costs.

ORMSBY AND ABRAHAM HITE *against* FRANCIS C. KENDALL.

ERROR to *Pulaski Circuit Court.*

A motion to dismiss for want of a bond for costs is waived by pleading over.

If a person undertakes to contract as an agent for an individual or a corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible.

The agent, when sued upon a contract, can only exonerate himself from responsibility by showing his authority to bind those for whom he is undertaking to act.

Consequently, where a note is given in the words "the steamer Tecumseh and owners promise to pay, &c.," signed "F. C. Kendall," the person who signs the note is responsible, unless he shows that he had authority to contract for the steamer and owners.

This was an action of assumpsit founded upon a writing in the following words:

"Ninety days after date Steamer Tecumseh and owners promise to pay M. & H. Devinney, or order, the sum of two hundred and seventy-six $\frac{1}{100}$ dollars for value received. F. C. KENDALL."

Endorsed, "pay Ormsby Hite & Co., Sept. 3, 1837."

M. & H. DEVINNEY."

The declaration contained two counts. The first charged that the defendant describing himself as the "Steamer Tecumseh and owners," promised to pay, &c. The second stated that he promised that the Steamer Tecumseh and owners, &c., would pay; and that Steamer Tecumseh and owners did not, of which the defendant had due notice, and therefore he promised, &c. The defendant first moved the court to dismiss the suit for want of bond for costs, upon the ground that the plaintiffs were non-residents, which motion was overruled; and he thereupon pleaded non-assumpsit, and went to trial. Upon the trial, the only evidence offered was the note and endorsement, the hand writing of Kendall being first proven, whereupon, the court instructed the jury to find as in a case of a non-suit, and they found accordingly for the defendant. Two questions were presented by the record. 1st. Can the defendants take any advantage by their motion to dismiss the case for want of a bond for the costs being first filed

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in the suit, after having pleaded over to the action; and secondly, what is the legal effect of the instrument declared on.

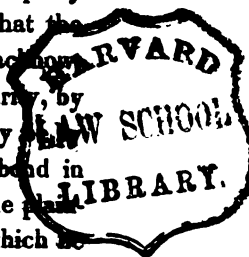
PIKE, for plaintiff in error:

Two questions only are presented by the record: First, what advantage can the defendant now have of his motion to dismiss for want of a bond for costs? and second, what is the legal effect of the instrument declared on, and what are the legal liabilities of Kendall arising upon the face of it?

First, then, as to the bond for costs: We contend that it was in every way sufficient, and that it complied in substance and effect with the requisitions of the statute. It is true that the first section of chap. xxxiv of the Revised Statutes provides that the plaintiff shall file the obligation of some responsible person, being a resident of this State, by which he shall acknowledge himself bound to pay all costs which may accrue in such action, and the 33d section provides that where there is a security for costs, judgment shall be entered against him on motion, for all costs for which he may be liable.

The security, therefore, is to acknowledge himself bound to pay all costs. How is this to be done? Must his obligation simply be, "I, A. B., acknowledge myself bound to pay all costs," or must he, as has been elsewhere contended, execute a bond in a sum certain, conditioned that he himself will pay all costs? Does he not become equally bound to pay the costs, when he gives his bond conditioned that the plaintiff will pay them or cause them to be paid? Is not this acknowledging himself bound to pay the costs? Certainly the security, by such a bond, becomes bound to pay them; and if so, it can only be acknowledged himself bound to pay them. Does not the bond in this case state that the security is bound to pay the costs, if the plaintiff does not do so? Undoubtedly—and creates a liability which he cannot escape.

The whole object of a bond for costs is to secure to the officers of the court in their fees. If this object is effected by the bond in the present case, the statute is complied with—for, as this court said in *Hughes vs. Martin*, 1 Ark. 386, "the parties in civil proceedings are



seldom, if ever, bound to adopt the precise language used in the statute.

We contend, therefore, that the bond was sufficient: and if it were not, the defendant waived the benefit of his motion to dismiss, by afterwards pleading to the action. It was a preliminary motion, in the nature of a plea to the jurisdiction—that the plaintiff had no right to sue; and the objection was cured by pleading in chief. If the defendant would have had advantage of it here, he should have rested upon it, and not afterwards appeared.

Let us examine then the effect of the instrument sued on, and the liability of Kendall on its face. And the court will remark that it does not contain a promise by Kendall that the Tecumseh and owners will pay—it contains no guarantee—but purports to be a direct promise from the Tecumseh and owners, and is signed by Kendall. What was his capacity does not appear upon the face of it, nor is it in evidence. It is not shown that he was part owner, captain, or agent for the owners—but the Tecumseh and owners promise to pay, and Kendall signs the note. Whose promise is there then upon the note? The owners of the Tecumseh do not sign it, nor is it signed by Kendall for them as agent or captain. No person, therefore, can be responsible upon it, if Kendall be not, and if he be responsible, it is a direct and not a collateral responsibility, because it contains no guarantee.

“It is a universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for another*, or by *procuration* of another, *which are the words of exclusion*. Unless he says plainly, “*I am the mere scribe*,” he becomes liable. Per Lord ELLENBOROUGH, in *Leadbitter vs. Farrow*, 5 M. & S. 349. In that case Farrow had drawn a bill on certain bankers, by which they were requested to pay £50, which place to the account of the Durham bank, as advised: and it was signed *Christ'r Farrow*. Farrow was agent of the Durham bank, and yet he was held personally liable in an action on the bill. And BAYLEY, J. concurred with Lord ELLENBOROUGH, and said, “the drawer by the act of drawing, pledges his name to the

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bill's being duly honored; and though the plaintiff in this case might know that the defendant was an agent, he might also know that he had given this pledge. ABBOTT and HOLROYD were of the same opinion, and the latter said that he apprehended that no action would lie on the bill except against those who were the parties to it.

So in *Thomas vs. Bishop*, 2 Str. 955, where a bill was directed to Bishop, Cashier of York Buildings Co., and he accepted it in his own name, without qualification, it was held that he was personally liable; and the principal reason assigned by the court was, that a bill of exchange was a contract, by the custom of merchants, and the whole of that contract must appear in writing. And the court said, "now here is nothing in writing to bind the Company, nor can any action be maintained against them upon the bill."

The words of an instrument are to be taken most strongly against the party using them. 1 *Leigh, N. P.* 361. And where the words were "I promise to pay on demand, &c.," and the instrument was addressed to the defendant, who wrote across it "accepted, J. B.," it was held by Lord LYNCHURST to be a promissory note, as it contained a promise to pay, and the signature of the defendant adopted that promise. *Leigh, ubi sup.*; *Block vs. Bell*, 1 M. and Rob. 149. So a note whereby a party promises to pay, or cause to be paid, is a promissory note, and may be declared on as such. *Leigh* 362; *Lovell vs. Hill*, 6 C. & P. 238.

The principle is perfectly well settled that if a person undertake to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible. *White vs. Skinner*, 13 J. R. 307; *Randal vs. Van Vechten*, 19 J. R. 60; *Taft vs. Brewster*, 9 J. R. 334; *Tippets vs. Walker*, 4 Mass. 595; *Mott vs. Hicks*, per SUTHERLAND, J., 1 Cowen, 536—and the agent, when sued upon such a contract, can exonerate himself from personal liability, only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show that he had not authority. The defendant must show, affirmatively that he had. *Mott vs. Hicks, ubi sup.* In that case the note ran thus. "The President and Directors of the Woodstock Glass Com-

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pany promise to pay." Signed "*W. H. President.*" It was held that it was the act of the Corporation by the proper officer, and therefore the Corporation was liable—but it was admitted, that, had the Corporation not been liable upon it, *W. H.* would have been liable. Undoubtedly, said Ch. J. SAVAGE, *p.* 542, the defendant is personally liable on the note, unless the Company is liable. In this case, the owners of the *Tecumseh* are not liable on the note, for it was not made, nor does it purport to have been made, by any person authorized to contract for them.

We have not been able to find any reported case, in which a note precisely like the one sued on here was in controversy. The only case which is any thing like it, is *Andover vs. Grafton*, 7 *N. H. Rep.* 298, where the note ran thus, "Value received, Town of Grafton promises to pay Town of Andover fifty dollars on demand, and interest.

LOVELL KELTON, *for the Select-men of Grafton.*"

It was held that the town was not responsible on this note. But that case is not in point, because here it is not shown on the face of the note that Kendall was a different person from the owners of the *Tecumseh*, or that he contracted in the name of the owners, or as their agent. The fact probably might have been that he was the master, but it neither appears on the record nor on the face of the note. The decisions upon the liabilities of agents do not apply, because the note does not show that Kendall was an agent. The decisions as to ship masters do not apply, for the same reason.

But it seems to us that where Kendall states in the note that the owners of the *Tecumseh* will pay, and signs his own name, as it does not appear on the face of the note, *either that he is not one of the owners*, or that he signs as agent for the owners, the legal presumption is that he is an owner, and then the note is of course his note. It might under some circumstances be the note of the other owners, and they too might be liable upon it, but at all events it is *his* note, and he can be sued upon it, and if he ought not to have been sued alone, that is a matter for him to plead. He has signed a note which contains a promise to pay, and it must of course be taken to be *his* promise to pay, unless he shows affirmatively that it is *not* his promise; and as that fact

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neither appears in the note, because it does not show that he was not an owner; nor was it proved at the trial, for he offered no proof, we can see no possible reason for the decision of the court below.

TRAPNALL & COCKE, *Contra*:

The plea of non assumpsit under oath, puts the plaintiff upon proof not only that the defendant executed the note, but that he was one of the owners of the steamer *Tecumseh*. For only the steamer *Tecumseh* and owners are bound by the note to pay. By the very terms of the note, it is the steamer *Tecumseh* and owners who make the promise to pay, and under the first count it would be necessary to entitle the plaintiffs to recover, to prove that Kendall not only signed the note, but that he also was one of the owners. The second count alleges that the said defendant promised that the steamer *Tecumseh* and owners would pay, &c. &c. The defendant insists that between this count and the note produced as evidence there is a material variance. The count averring that Kendall promised that the steamer *Tecumseh* and owners would pay, whereas the promise on the face of the note is a direct promise by the steamer *Tecumseh* and owners to pay and not the promise of Kendall that they would pay.

Inasmuch, therefore, as no evidence was adduced to identify Kendall with the steamer *Tecumseh* and owners in support of the first count, and no evidence that he promised that said steamer and owners would pay in support of the second count, the court very properly instructed the jury to find as in a case of a non suit.

DICKINSON, *Judge*, delivered the opinion of the court:

The first question has been so repeatedly ruled in this court, that we deem it unnecessary to add any thing further upon it; that where a party has made his motion to dismiss the cause, and after that is decided against him by the court, pleads over; he waives all advantage which he could have had upon his motion, and puts himself upon the issue formed. This brings us to the second and only remaining question to be determined. It was not shown in evidence that the defendant was part owner, captain, or agent of the steamer *Tecumseh*. The note

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simply is "that the steamer Tecumseh and owners promise to pay," and Kendall signs it. Whose promise is it? If the steamer and owners are bound by it, Kendall surely is not, and if Kendall be personally liable, the steamer Tecumseh, and owners are discharged from all responsibility.

In *Leadbitter vs. Farrow*, 5 M. & S. 349, Ld. ELLENBOROUGH said, "it is a universal rule, that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribed it for another, or by procuration of another, which words are words of exclusion, or unless he says 'I am the mere scribe,' he becomes liable." In that case Farrow had drawn a bill upon certain bankers, by which they were requested to pay and place the same to the account of the Durham bank as advised, and merely signed his name to it. The proof showed that Farrow had been the agent of the bank for a considerable time, and yet he was held upon this bill to be personally liable, and BAYLEY, J. said, "though the plaintiff in the action might know the defendant was an agent, he might also know he had given his own pledge by affixing his signature to the bill." The principle is well settled, that if a person undertakes to contract as an agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible. *White vs. Skinner*, 13 J. R. 307; *Randall vs. Van Vechten*, 19 J. R. 60; *Taft vs. Brewster*, 9 J. R. 334; *Tippetts vs. Walker*, 4 Mass. R. 596; and *Mott vs. Hicks*, 1 Cowen 536. The agent, when sued upon a contract, can only exonerate himself from responsibility by showing his authority to bind those for whom he is undertaking to act. It is not for the plaintiff to show that he has not authority. The application of this principle to the case now under consideration clearly proves that Kendall is personally responsible, and not the steamboat owners. He was bound to show that he had authority to contract for the steamer Tecumseh and owners, and to prove this affirmatively, and in failing so to do, he becomes himself personally liable upon his undertaking. The note upon its face declares no facts which could raise a presumption that he was either part owner, captain, or agent. He signs it in neither of these capacities, and having no lawful authority to contract for them, he

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has made himself personally responsible by affixing his own signature to the instrument; consequently, the court erred in instructing the jury to find as in a case of non suit. The judgment of the court below must therefore be reversed.

ALEXANDER H. OLNSTEAD *against* SEABORN HILL.ERROR to *Crawford Circuit Court.*

A party, to entitle himself to a new trial on the ground of newly discovered testimony, must satisfactorily show to, the court, 1st. That in the preparing of the case for trial, he was guilty of no neglect or *laches*. 2ndly. That the new evidence sought to be introduced could not have been procured by due diligence at the former trial. 3dly. That such evidence is *material* and *important*, which must be shown to the court either by the affidavit of the witness himself, or by some other legal means.

4thly. That this new evidence is not cumulative in its character or consequences. Cumulative evidence is such as tends to support the fact or issue which was before attempted to be proved upon the trial.

To give to a clerk or agent a portion of the profits of sales, as a compensation for his labor, on the amount of goods sold, does not constitute the agent or clerk a partner in the business, *if it appear* that it was a mode of payment designed to increase diligence and secure exertions.

Upon the principles of commercial policy, an agreement may constitute a partnership as to third persons, when it creates no such relation between the parties themselves. And, therefore, a clerk or an agent may, by his own conduct, come to be regarded as a partner by the trading community, and be sued as such, and yet at the same time be liable to an action at law by the real partners.

For they who hold themselves out to the world as partners, are to be so regarded, as to creditors and third persons: and the partnership may be established by any evidence showing that they so held themselves out to the public, and were so regarded by the trading community.

Between themselves, the agreement or contract alone constitutes them partners.

This was an action of *assumpsit*, brought by *Hill* against *Olmstead*. The general issue was pleaded; and by consent the evidence was submitted to the court, instead of the jury, and a judgment was rendered for the plaintiff below. There was a motion for a new trial on the part of the defendant, which was overruled; whereupon he excepted to the opinion of the court, and incorporated into the record, the whole of the evidence that was given upon the trial.

The testimony was that Hill had purchased a parcel of goods with his own money, and employed Olmstead to superintend the store and sell them out, and agreed that he should have as a compensation for his services and attention to the business one third of the profits. In the goods themselves Olmstead had no interest, he had advanced no part of the capital, and was not to be responsible for any losses which the concern might sustain. It was also in evidence that Olmstead

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controlled and managed the business of the store, and embarked in speculations on the firm account whenever an opportunity offered, and that it was the general understanding of the neighborhood that defendant and plaintiff were partners. After most of the goods had been sold, Olmstead voluntarily left the store, and turned over a number of notes and accounts to Hill's clerk to collect. The suit was instituted by Hill to recover the price of goods made use of by Olmstead while superintending the store, on his individual account. The correctness of the charges was admitted upon the trial. But it was insisted that the facts disclosed in evidence proved they were partners, and that consequently no recovery could be had in an action at law.

The motion for a new trial was sworn to, and stated the grounds to be, first, that the finding was without, and contrary to, evidence; and second, that since the trial he had discovered new and important evidence of which he had no knowledge until after the trial, that there was no other witness by whom he could have proven the same facts, that he was informed by Robert S. Gibson that a large portion of the goods sold by him (Olmstead) at the store, were purchased in New-Orleans, and marked and forwarded in Olmstead's name; that he was satisfied that he could establish those facts by Gibson, and that he could, and would, if allowed a new trial, have the benefit of, and produce this testimony.

WALKER & SCOTT, for plaintiff in error:

One partner cannot sue another in relation to partnership accounts. See 1 *Chit. Plead.* p. 12, 26; 12 *J. R.* 401; 14 *J. R.* 318; *Go on Partnership.*

The only other point involved is were they partners. The defendant had sole charge of the goods, engaged in speculation for the benefit of the firm, the books were kept by them as partners. The clerks understood them to be partners, and it was the common understanding that they were partners. Lord ELLENBOROUGH decided in the case of *Dry vs. Boswell*, 1 *Camp.* 329, that where two agreed to share the profit arising from working a lighter, (the lighter belonging to one of them,) that they were partners. There are some contradictory decisions in the English courts, and a distinction is drawn by them between

one who receives a part of the profits as a compensation for services, and those who are interested in the losses as well as profits. With regard to those decisions, after enumerating them, the learned Judge remarks, "the distinction is to be deplored, and is justly open to the objection of not having been established upon due consideration."

Collyer, on partnership, p. 2, defines a partnership as between the parties, thus: "It is a contract between two or more persons to join together their money, goods, labor, and skill, or any, or all of them, with an understanding to divide the profits between them." There is a case in 1 *Mar. Ky. Rep. p. 181*, which is similar in every important feature. There a grocer furnished goods to another in Louisville, who sold them for one third of the profits. It was decided that they were partners.

There is also a case in 13 *Wend. 425*, which it is believed sustains this position.

Collyer, on Partnership, p. 8, and note 1, under that page, "that an agreement between two to get up a store, one to superintend the business and to receive one third of the profits realized, (*he putting in no stock*) constitutes a partnership." Page 8, the same writer says that to constitute a partnership between the parties themselves there must be a communion of profits between them—a communion of profits implies a communion of loss.

It will be recollected that in this case the plaintiff in error engaged in speculations, bought and sold for the benefit of the firm. The keeping of the books in the name of the firm, trading and being recognized by the community generally as partners, not only made them partners as to third persons, but it is strong evidence of a partnership between themselves.

TRAPNALL & COCKE, and PIKE, *Contra* :

The court will perceive that the newly discovered testimony related to a point which had already been controverted and to which evidence was adduced upon the first trial. No principle is better settled than that a new trial will not be granted to admit new testimony which is merely cumulative in its character. "It is against the general rule of law to grant a new trial merely for the discovery of cumulative

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facts and circumstances relating to the same matter which was principally controverted upon the former trial. It is the duty of the parties to come prepared upon the principal points, and new trials would be endless if every additional circumstance bearing on the fact in litigation, was a cause for a new trial." *Smith vs. Brush*, 8 J. R. 84. In the case of *The People vs. The Superior Court of New-York*, 10 Wend. 285, cumulative evidence is defined to be such as tends to support the same fact which was before attempted to be proved; and in the case of *Pike vs. Evans*, 15 J. R. 310, a new trial was refused by the court, when the newly discovered evidence was admitted to be material, because it was merely cumulative, and related to facts and circumstances which were principally controverted upon the former trial. See also *Ewing vs. Price*, 3 J. J. Marshall, 520; *Daniel vs. Daniel*, 2 J. J. Marshall, 52; *Wills vs. Phelps*, 4 Bibb, 563.

We readily admit that the agreement between Hill and Olmstead would render them liable to third persons as partners. But we deny that they were partners as between themselves. There are many agreements which will make the parties to them, upon principles of commercial policy, responsible as partners to third persons; but which *inter se* create no such relation. This distinction is clearly taken in the case of *Wagh vs. Carver*, 2 H. Black. 238, and rests upon the ground "that he who takes a share of all the profits indefinitely shall, by operation of law, be made liable to losses if losses arise upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." See also *Ross vs. Drinker*, 2 Hall, 415; *Champion vs. Bostwick*, 18 Wend. 175; *Jordon vs. Wilkins*, 3 Wash. C. C. Rep. 110. But as between the parties to the agreement this rule does not obtain. As to them the court will look to the nature of the contract, and if its stipulations do not constitute them partners in a legal and technical sense, they will not be regarded as standing in that connection. Hence the plaintiff objected to the admission of testimony to show the understanding of the neighborhood upon this subject. We admit such testimony would have been competent in a suit against them at the instance of third persons, who could only know the relation subsisting between them from the char-

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acter in which they held themselves out to the world. But, as between themselves, it is not the understanding of others, but their own agreement, which must determine their right. And as Olmstead relied upon the existence of a partnership as his defence at law, he was bound to make good that defence by proving an actually subsisting partnership. In *Chase vs. Barrett*, 4 Paige, 148, the court say "to constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds according to the intention of the parties, and an agreement, either express or implied, to participate in the profits and losses of the business either rateably or in some other proportion." Partnership is defined by *Kent*, 3d vol. Com. 23, 24, to be a contract of two or more persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. The two leading principles of the contract are a common interest in the stock of the company, and a personal responsibility for the partnership engagements." It will be found upon examining the agreement between Hill and Olmstead that it is wanting in some of the most essential features of a partnership as portrayed in the above definitions. There was no joint ownership of the partnership funds, no agreement expressed or implied to participate in the losses of the business. On the contrary, Hill supplied the entire fund and was to be responsible for all the losses. It is true that Kent further states that "if one person advances funds, and another furnishes his personal services or skill in carrying on a trade, and is to share in the profits, it amounts to a partnership;" but this principle is accompanied with the qualification "that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent. And in page 33 of same volume, he also remarks, "to allow a clerk or agent a portion of the profits of sales as a compensation for labor; or a factor, such a per-centage on the amount of sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in the character of profits." The statement of Hill to the witness Grogg, elicited by

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the defendant furnishes the most clear and distinct account of the nature and extent of the connection between Olmstead and himself. This statement is unimpeached. For Dillard does not pretend to know any thing of the agreement actually subsisting between the parties. He merely states his own belief, and that of the neighborhood, while the testimony of the remaining witnesses tends to corroborate and strengthen the account of Hill. From that account, which we are fully authorized to receive as true, it is manifest that Olmstead was not received into the association as a *merchant*, but as an *agent only*. He was not regarded as a "regular partner," and a share in the profits was given him "merely as a compensation for his time and trouble, and received in the light of wages." It was a mode of payment adopted to secure an increase of exertion, and was not understood to be an interest in the profits in the character of profits. The facts in this case are strikingly alike to those in the case of *Heaketh vs. Blanchard*, 4 East, 144. There A., having neither money or credit, offered to B. that if he would order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. should have half for his trouble. B. lent his credit on this contract, and ordered the goods on his joint account, which were furnished accordingly, and afterwards paid for by B. alone, who brought an action of assumpsit to recover back such payment of A., who had not accounted to him for the profits. And Lord ELLENBOROUGH remarked upon it that "the distinction taken in *Waugh vs. Conner*, applies to this case. Quoad third persons, it was a partnership for the plaintiff was to share half the profits. But as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble and for lending Roberteau his credit. The case of *Wilkinson vs. Frazier*, 4 Esp. 183, was an action of assumpsit brought by a sailor against the captain of the vessel. "The sailor engaged on a whaling voyage, and was to receive a certain portion of the profits of the voyage, in lieu of wages, when the cargo was sold. It was objected, that as the defendant as well as the plaintiff was to be paid out of the profits of the voyage, they were therefore partners, and as one partner could not maintain this action against another, the action

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was not maintainable. Lord ALVANLEY said he would not non-suit the plaintiff on such an objection: that the plaintiff and other sailors were hired by the defendant and owners to serve on board the ship for wages to be paid to them; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place, and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the product of the voyage.

In the case before the court Olmstead had no right whatever to the goods. They were purchased and paid for by Hill, and belonged exclusively to him, and were we to admit the existence of a partnership from the agreement between them, it is still evident that the partnership would not be in the goods themselves, but merely in the profits which might arise from the sale of them. And if Olmstead appropriated any part of the goods to his private use, Hill would clearly be entitled to maintain this action to recover back their value. The goods were Hill's private property, placed by him in the care of Olmstead to sell out for a profit, in which he was to share in a certain proportion. There is no provision in the agreement whereby the firm of Hill and Olmstead, (if any such in fact existed,) was to acquire an interest in the goods beyond what might arise from the profits of the sale. Olmstead; therefore, in making use of the goods on his private account was appropriating them to a purpose foreign to the partnership agreement, and as the property in the goods was not in the firm, but in Hill individually, he would be responsible for the payment of them to Hill, and not to the firm.

LACY, *Judge*, delivered the opinion of the court:

The doctrine in regard to granting new trials upon the ground of newly discovered testimony, is fully explained and established in the case of *Robins vs. Fowler*, heretofore decided at a previous term of this court. Indeed the authorities are so numerous and full upon the point, and the reasons and principles upon which they rest, are so obvious and conclusive, that it seems almost impossible to overlook the essential requisites that the law requires to entitle a party to a new

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trial. He must have been guilty of no neglect or laches in preparing his case for trial. It must have been out of his power to procure the newly discovered evidence upon the former trial by due diligence and exertion to obtain it: and he must show to the court that the newly discovered evidence is material and important, by the affidavit of the witness, or by some other legal means; so that the court may judge of its materiality and sufficiency; and it must not be cumulative in its character and consequences. It is the duty of the parties to come prepared upon the principal points; and new trials would be endless, if every additional circumstance bearing upon the facts in litigation were a cause for new trial.

Cumulative evidence is such as tends to support the fact or issue which was before attempted to be proved upon the trial. The newly discovered evidence, in the present instance, does not possess a single requisite which would authorize its introduction; and even if admitted, it would not vary and alter the finding. The defendant below proposes to prove that it is within the knowledge of the witness that a large portion of the goods sold by him at the store of the plaintiff, were purchased in New-Orleans, and forwarded in the name of the defendant. This fact he swears to himself, but he has not substantiated it by the affidavit of the witness; nor has he shown that he used due diligence to procure the testimony on the former trial. If all these requisites were established, still the testimony would be inadmissible, for it is certainly cumulative evidence, because the issue was formed and tried in regard to the partnership of the parties. Again the evidence, if offered, is inadmissible on another ground, because it would not prove, or tend to prove the existence of a partnership. As the defendant relied upon the existence of a partnership in bar of the plaintiff's action, he was bound to prove it affirmatively, as he would any other given fact upon which he rested his defence. Chancellor KENT in the 3d vol. of his Commentaries, pages 23 and 24, has defined a "partnership to be a contract of two or more persons to place their money, effects, labor or skill, or some or all of them in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." The leading principles of such a contract are a common interest in the stock of the company, and a

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personal responsibility in the partnership engagements." If one person advances funds, and another puts against it his personal services or skill, for the purpose of carrying on trade, and they are to share the profits between them, this amounts to a partnership, provided he who has an interest in the profits, does not receive his share as a mere substitute for commissions; and is received in the company as a partner or merchant, and not as a factor or agent. To give a clerk or agent, a portion of the profits of sales, as a compensation for his labor, on the amount of goods sold, does not constitute the agent or clerk a partner in the business, if it appear that it was intended as a mode of payment adopted for the purpose of increasing diligence and securing exertions. *Chase vs. Barrett*, 4 Paige, 148; *Hesketh vs. Blanchard*, 4 East. 144; *Wilkinson vs. Frazier*, 4 Esp. 183. Upon the principles of commercial policy, an agreement may constitute a partnership as to third persons, when it creates no such relation between the parties themselves. This distinction runs through all the authorities upon the subject, and is based upon the soundest principles of commercial intercourse, and of public policy. A party who receives a share of the profits individually, shall by intendment of law be held liable for losses if any occur, for by taking a part of the profits he withdraws from the creditors a portion of that fund which is the proper security for the payment of these debts. *Waugh vs. Carver*, 2 H. B. 328; *Ross vs. Drinker*, 2 Hall, 415; *Champion vs. Bostwick*, 18 Wend. 176; *Jordon vs. Wilkins*, 3 Wash. C. C. R. 110. Consequently they who hold themselves out to the world as partners in business or trade, are to be so regarded *quoad* creditors and third persons; and the partnership may be established by any evidence showing that they so hold themselves out to the public; and were so regarded by the trading community. But between themselves, as before laid down, the rule is different; and the agreement or contract alone constitutes them partners, and whether it be by parol or in writing, or whether express or implied, is as capable of being proved as any other fact, and must be established by the same grade or species of evidence. The proof in the case now before us satisfactorily shows that Olmstead was not received by Hill as his partner or merchant, but merely as his agent and clerk, whose wages were to be paid out of the profits of the sales of the

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goods. There was no joint ownership of the funds, no agreement to participate and share the profits and losses of the business. The plaintiff below supplied the entire fund, and was alone responsible for the losses. The defendant merely acted as his agent or clerk. And this being the case, he cannot in any possible point of view be considered as a partner in the business. The judgment of the Circuit Court must therefore be affirmed with costs.

CARTWELL, FOR THE USE OF HOUSTON, against MENIFEE.**ERROR to Conway Circuit Court.**

Every attorney regularly licensed, and duly admitted to practice in the courts of this State, possesses a general license to appear in those courts for any suitors who may retain him: but his license is not of itself an authority to appear for any particular person, until he is in fact employed by or retained for him.

But his authority to appear cannot be legally questioned, until facts or circumstances are shown, by affidavit, or otherwise, sufficient to raise a legal presumption that he is not authorized to appear.

Where A. sues for the use of B. and the facts are that the attorney appearing for the plaintiff knew nothing of A., nor where he resided, that he appeared for B. by retainer of B., that B. had possession of the instrument sued on, and filed it, that the Constable had receipted to C. for it, as received by his hands of A., and that the receipt was assigned by C. to B., the legal presumption is that B. was the bona fide holder of the instrument, and equitably entitled to its proceeds.

And this presumption being in no way impugned, the admission that the attorney was retained by B., shows a sufficient legal authority in him to appear.

This suit was founded on a writing obligatory, purporting to have been made by *Nathaniel H. Buckley* and *N. Meniffee*, payable to *H. R. Cartwell*, in whose name it was commenced and prosecuted, for the use of *John L. Houston*, before a Justice of the Peace, who rendered a judgment upon it against the defendant in error, from which he appealed to the Circuit Court, and while the case was there pending, obtained a rule upon *John Linton*, an attorney at law, representing the plaintiff in the case in that court, to produce his authority from the plaintiff to prosecute the suit, and an order that the same should be dismissed, if such authority was not produced on or before the second day of the next term, and that in the meantime all further proceedings in the case be stayed. The rule and order were founded solely upon a statement, on oath, made by *Linton* in the case, on the hearing of a motion for a rule on the plaintiff to file a bond and security for the costs of this suit, that he did not know where *Cartwell* resided, whether in *Arkansas* or *Nashville*, and that he knew nothing about him. *Linton*, after the rule was made, appeared in court, in response, and stated that he was a practising attorney in that court, and that he appeared there for *John L. Houston*, which was admitted; he also admitted that he knew nothing of *Cartwell*; and moved the

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court to set aside the rule, and discharge him from it; but the court refused to set aside or discharge the rule, and the case stood continued until the next term of the court. At that term, when the case was called, he produced a receipt, signed by a Constable, acknowledging the receipt of the writing obligatory sued on, for collection, and stating that it was received by the hand of A. Wallace, of H. R. Cartwell, with the following endorsement on the back of it, "for value received, I assign this receipt to John L. Houston;" signed, "*A. Wallace*;" and thereupon again moved the court to discharge the rule, which was refused by the court, the case dismissed, and judgment rendered against the plaintiff for costs in that as well as in the Justice's court.

BLACKBURN, for plaintiff in error:

The court had no power to call upon any regularly authorized practising attorney for his authority to prosecute a suit. His license is a general authority; and the presumption always is when he appears in the prosecution or defence of a suit that he does so legally and professionally. See *Acts of 1836*, p. 162; *Tidd's Prac.* 106; *Tally vs. Reynolds*, 1 *Ark. Rep.* 99; 3 *Taunt.* 486; 1 *Salk* 86, 88; 1 *Chit. Rep.* 142, 191; *Com. Dig.*, acting attorneys; *Jackson vs. Stewart*, 6 *J. R.* 37; *Denton vs. Stokes*, 6 *J. R.* 302; 2 *Str.* 693.

The defendant in error had fully appeared by his counsel to this action, specially when he moved for security for costs, which was a waiver of all irregularities complained of. See *Tidd's Prac.* 64.

The defendant in error having brought the appeal from the Justice to the Circuit Court, was plaintiff in appeal in the Circuit Court, and whether the appellee had appeared or not, he could only dismiss his own appeal or go into the merits of the case. *Ter. Dig.*, *Justices of the Peace*, sec. 60, 61; *Tally vs. Reynolds*, 1 *Ark. Rep.* 99.

FOWLER, *Contra*:

RINGO, *Chief Justice*, delivered the opinion of the Court:

The question to be decided is, whether the rule upon Linton, to produce his authority to prosecute the suit was authorized by law, and

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if so, whether the authority produced by him, was legally sufficient for that purpose? In the case of *Tally vs. Reynolds*, 1 Ark. Rep. 99, this court recognized the principle that every attorney regularly licensed and duly admitted to practice in the courts of this State, possesses by virtue of his license and admission, a general right to appear, for any of the suitors in the courts where he is admitted to practice, who may retain him for that purpose: but his license is not of itself an authority to appear as the representative of any particular person, until he is in fact employed or retained for such person. Yet his authority to represent any suitor on whose behalf he may appear cannot be legally questioned, until facts or circumstances are shown by affidavit, or otherwise, sufficient to raise a legal presumption that he is not legally authorized to appear for the party he assumes to represent. Whenever this appears affirmatively the attorney may be legally required to produce his authority to appear for, or in the place of such party, otherwise he cannot. But the facts and circumstances disclosed by the record before us, do not, in our opinion, warrant a presumption that the attorney, Linton, had no legal authority to appear for the plaintiff, and prosecute this suit; because, it appears affirmatively from the record, that this suit is prosecuted for the use of Houston, and that the "plaintiff produced and filed his writing obligatory" in the Justice's Court, as he was bound by law to do, which facts warrants the legal presumption that Houston is the *bona fide* holder of the obligation, and equitably entitled to the avails thereof, notwithstanding it does not appear to have been endorsed and assigned to him by the payee, and this presumption is not repelled by any testimony, proving, or in any wise conducing to prove, that he obtained the possession thereof fraudulently or unlawfully; and therefore the rule upon the attorney to produce his authority to prosecute the suit was wholly unauthorized by law; and inasmuch as the legal presumption that Houston is the *bona fide* holder of the obligation in suit, is not in any manner impugned by any thing appearing in the record, or even questioned by the defendant, although the statement upon which the rule against the attorney is based, is set out entire in the record, consequently his right to sue in the name of Cartwell, the payee, must be conceded; and upon this state of the case, the allegation of the

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attorney that he was retained by and appearing on behalf of Houston, when admitted to be true, as it appears to have been on his motion to discharge the rule, showed a sufficient legal authority for his appearance in and prosecution of the suit, in the name of Cartwell, and thereupon the rule against him ought to have been discharged, and he suffered to proceed in the case according to law, as the attorney for the plaintiff. We are therefore of the opinion that the court erred in entering the rule against the attorney representing the plaintiff requiring him to discharge said rule upon the authority shown by him, and also in dismissing the suit, as upon the ground of a failure on his part to produce any legal authority to appear and prosecute the same for the plaintiff; wherefore the judgment of the Circuit Court is reversed.

THOMAS J. HOWELL *against* SAMUEL H. WEBB.

ERROR to *Pulaski Circuit Court.*

Upon mere abstract propositions of a law, a court is not bound to instruct the jury; and if instructions asked for are irrelevant, they should be refused.

Where the plaintiff and defendant had rented a house by parol agreement as co-tenants, and after the rent had become due, the defendant executed to the landlord his individual bond for the whole rent, the execution and delivery of the bond operated by law as an extinguishment of the *joint* liability of the plaintiff and defendant, and the plaintiff was forever discharged from all liability on his parol contract.

And the giving such bond was a payment of the rent, and raised a legal liability on the part of the plaintiff to refund his portion, which was good matter for a plea of set-off; if the plaintiff agreed to the change, either expressly, or by tacit acquiescence.

And when this matter is pleaded as set-off, if the record fails to show that the original renting was by contract in writing, it will be presumed, against the plaintiff, to have been merely by parol.

To authorize a new trial, upon the ground that the verdict was contrary to evidence, it must have been clearly against the weight of evidence; so that on first blush it should shock our sense of justice and right.

This was an action of debt brought by *Howell* against *Webb*. The defendant pleaded set-off, for money due for the rent and occupation of a certain house and lot. Upon replication and issue to this plea, the evidence in the case was, briefly, that the parties had been partners as druggists and physicians, and while partners had jointly rented a house and lot; whether by contract in writing, or by parol, did not appear by the record: that after some time the landlord became dissatisfied, and unwilling to rest upon *Howell's* responsibility for the rent, and upon that *Webb* gave his individual bond for the amount: half of which amount he claimed as a set-off against *Howell*. *Howell* never objected to this arrangement, but on the contrary, afterwards said that he was willing to pay his part of the rent, if he could pay it in *Webb's* own paper. Other evidence was offered and excluded, which it is unnecessary to notice.

Upon this state of evidence the plaintiff asked for several instructions, all substantially to the effect, that the evidence showed *Webb* and *Howell* to have been co-tenants or tenants in common, or partners, in renting the house, and that consequently the rent was no ground for a plea of set-off, being a partnership matter which one

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partner could not set-off against a bond given by him to the other. These instructions were refused, and the defendant had judgment for the half of the the rent, deducting the amount of the bond sued on.

ABSENT, DICKINSON, J.

FOWLER, for plaintiffs in error:

The evidence, although not of the clearest and most conclusive character, yet goes strongly to prove, and according to the view of counsel does prove, that Howell and Webb were joint tenants in the use and occupation of the house, nearly the whole period for which Webb claimed rent of Howell, and that they had jointly rented the house and lot of a third person. It also appears that Webb had paid a small portion of the rent to this third person, and had executed his bond for the residue; and that after Webb left the house, Howell remained in it a short time alone.

Each of the instructions, with the exception perhaps of the first, was properly moved, and should have been given by the court to the jury; and the refusal to give any of them is a sufficient cause for reversal of the judgment. It is admitted to be true, that no court is bound to give instructions on abstract principles of law, which the evidence does not show applicable to the case; but the converse is equally undeniable, that whenever a legal instruction is moved, which is warranted by the evidence, the court is bound to give it, and to refuse is error.

And it is not necessary that such a state of facts should positively appear, as to show that the principle of law is absolutely involved, in order to make it incumbent on the court to instruct. For instance, it is not required by law that the joint tenancy of Webb and Howell should be conclusively proved before it becomes the duty of the court to instruct whether one of them could or could not maintain an action at law against the other; but whenever any testimony is given, which conduces to prove such joint-tenancy, such evidence as from which a jury might rationally infer such joint-tenancy—the court is bound to give any instruction asked for, which is at all applicable to the facts. The jury are the exclusive judges of the facts, and must draw their

own inferences from the testimony, and the court must instruct them in the law.

Did the court below do it? The record in this case, and the following authorities will respond. 1 *Chit. Plead.* 25 *et seq.*; 2 *T. R.* 478, 482; 3 *Bibb's Rep.* 93, *Carlyle & Offat vs. Patterson*; 3 *Bac. Abr.* 188, 192, 193, *et seq.* 219; 18 *J. R.* 245; 14 *J. R.* 318.

ASHLEY & WATKINS, Contra:

How did the court below err in overruling the instructions moved for by the plaintiff? That they are chiefly antiquated doctrines of the English law, see the changes which have been wisely made on this subject by our Revised Statutes, *title Rent, and Use, and Occupation*, under head of *Landlord and Tenant* p. 520. The drift of the evidence shows fully that Webb and Howell were not co-tenants, or tenants in common, but they occupied separate and distinct portions of the premises, and the court will find upon examination of the several instructions, that the whole sum and substance of them is, that one joint-tenant, or tenant in common, or partner, cannot sue his co-tenant or partner *at law*. We answer that by our Revised Statutes, the duty of setting up matter of off-set is imperative upon the party claiming the off-set, and that it is intended broadly to be an equitable proceeding. *Rev. Stat.* 126.

But supposing that the court below erred in overruling the instructions moved for by the plaintiff, this court will not award a new trial, where there is good reason to think that the party could not have been injured by the Judges's mistake. *De Peyster vs. The Columbian Insurance Company*, 2 *Caines Rep.* p. 85; *Edmonson vs. Machall*, 2 *T. R.* 4.

LACY, Judge, delivered the opinion of the court:

Before we proceed to examine the instructions, we must ascertain whether or not the proof shows a joint tenancy, or tenancy in common, or whether or not it establishes a partnership; for if it tends to establish none of these facts then we can look upon the instructions refused in no other light than as mere abstract propositions, which, whether right or wrong, were rightfully overruled by the court below.

The object of instructions is to inform the jury upon some point either of law or evidence that is applicable to the case upon trial, and to guide and govern their verdict. Upon mere abstract propositions, a court is not bound to instruct the jury. If the instructions asked for be irrelevant, they should be refused, as tending to mislead instead of to enlighten the minds of the jury; and to encumber the record with foreign and useless matter that distracts and obscures the issue to be tried.

The proof, in the present case, as spread out in the bill of exceptions, is meagre and every way unsatisfactory. It does not define with accuracy or precision how, or in what manner the parties rented the premises, or whether they were jointly seized or not, neither do we think that inquiry a matter of any moment in deciding the question now before this court. The testimony itself, when taken separately, and considered in connection with the whole transaction, conclusively shows that the contract between the landlord and his co-tenants for the rent was a parol agreement. For the record fails to state that it was a written acknowledgment of the parties under seal, or to produce it to the court, so that it could be seen what kind of instrument it was. And even if it were doubtful whether it was a parol agreement, or one under seal; still the presumptions in favor of the verdict would amount to full proof on the point, and clearly demonstrate the facts to be as we have before stated them. It being a parol agreement, and not a contract under seal, the moment the defendant, Webb, executed his deed to the landlord for the rent, and it was delivered to, and accepted by him for that purpose, that instant it operated by intendment of law, as a merger or extinguishment of the joint liabilities of the co-tenants for the rent, and the plaintiff in the action was for ever discharged from all responsibility upon his parol promise or original undertaking. This principle is too familiar and self evident to require either argument or authority to support or illustrate it. It rests upon the known and universally admitted rule that the higher grade or dignity of instruments completely supercedes and destroys a less or subordinate one; because it furnishes the best and most conclusive evidence of the intention and rights of the parties; and consequently the inferior remedy is held to be merged or extinguished in the superior obligation. The execution

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of Webb's deed under seal, was not only an extinguishment of the parol promise of himself and his co-tenants, but it was a payment of the rent, and it thereby raised a legal liability on the part of his co-lessee to refund or pay his portion of the rent to the defendant, upon which an action at law or a plea of set-off would lie, provided it was shown upon the trial, that the plaintiff had agreed to the change of the contract, either by express promise, or by tacit acquiescence. In the present case, the plaintiff, so far as appears from the record, consented to the change of the contract: first, by acquiescing in it, or not objecting to it; and secondly, by expressly admitting that he was *willing* to pay the rent in the defendant's own paper. Here then is an express promise or undertaking to pay the defendant the rent; and of course the jury were fully warranted in their finding. Granting however that the evidence was uncertain on this point, (which is by no means conceded,) still this court would not be authorized in setting aside a verdict and awarding a new trial, merely on the ground that the jury had found contrary to the preponderance of the testimony. To authorize a new trial, the verdict must have been against the weight of evidence: so much so that on the first blush of it, it should shock our sense of justice and right. In regard to the questions of joint tenancy, or tenancy in common, or of partners in trade, we would barely remark, that they do not enter into or constitute any part of the inquiry now before this court; for in no reasonable aspect of the case, do they, in the most remote degree, affect the consideration of the express contract of the plaintiff to pay to the defendant the rent. The defendant's right of action accrued on his paying, by his deed, all the rent for the premises, and upon the plaintiff's promise to account to him for the same. Both of these facts are unquestionably established by the record; and they carry with them the legal inference of the plaintiff's liability. If this position be true, then it necessarily follows that all the instructions asked for by the plaintiff were mere naked abstract propositions, having no connection with or bearing on the evidence adduced; and consequently there is no error in the proceedings; and the judgment of the court below must be affirmed with costs.

PETER DUDLEY, EXECUTOR, against GRANDISON C. SMITH, AND OTHERS.

ERROR to Chicot Circuit Court.

In a suit by petition in debt, where the petition follows the Statute, by stating the plaintiff to be the legal holder of a note or bond against A. B., to the following effect; and sets out *in hæc verba*, a note or bond signed by the defendant by the initials of his christian name, the petition is good.

The averments in such petition are equivalent to a statement that the defendant signed the note or bond by a particular signature.

ABSENT, DICKINSON, J.

Peter Dudley, assignee of Theobald & Bain, and executor of Isham Talbot, deceased, stated by his petition under the statute "that he is, as the assignee of Theobald & Bain, and executor of Isham Talbot, deceased, the legal holder of a bond against the defendants Grandison C. Smith, George W. C. Graves, and Claiborne W. Smith, executed to said Theobald & Bain, and by them assigned to the plaintiff, executor of Isham Talbot, deceased, to the following effect:

\$8,000. &c.	Signed,	G. S. Smith, [seal.]
		G. W. C. Graves, [seal.]
		C. W. Smith, [seal.]

The defendants demurred to the petition for variance between it and the bond given on oyer—and the ground of demurrer was that the petition did not show that the defendants signed the bond by their several descriptions of G. C. Smith, &c. The court sustained the demurrer on that ground, and rendered final judgment against the plaintiff.

PIKE and SUTTON, for plaintiff in error:

We have been at great loss to imagine on what authority the court below decided the demurrer to be well taken, for we have not been able to find a single case to sustain the decision. It must have been decided upon the doctrine generally laid down, and thus stated by

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Lawes, in his work on pleadings: "If a bill or note be drawn in one name, and be declared upon as drawn in another, the variance will be fatal, *if the action be not brought against the drawer*, but the acceptor, or one of the endorsers; for, in such cases, the name is part of the description of the written instrument, and the defendant has no opportunity of pleading a misnomer in abatement." And *Whitwell vs. Bennett*, 3 Bos. and Pul. 559, is instanced, where in an action against the acceptor of a bill drawn by one *Couch*, the drawer was described as *Crouch*, where the variance was held fatal, upon the trial. But the general rule has never been shaken, that if the defendant be misnamed, he must plead it in abatement. *Lawes*, 308, 309; except where the misnomer amounts to a variance between the instrument, as declared on, and the same as given in evidence—as where, on a note by the form of Austin, Strobell, and Shurtleff, one of the firm was named in the declaration *Robert Strobell*, and it was proved upon the trial that his name was *Daniel Stobell*, the plaintiff was non-suited. *Gordon vs. Austin*, 4 T. R. 611.

The precise question here presented to the court, has, it is believed, never been determined, as in all probability, the exact objection here made, was never before taken.

But in *Wardell et al. vs. Pinney*, 1 Wend. 217, *Omen Wardell, Samuel Van Buren*, and *Charles Wardell*, brought suit upon a promissory note, made by Pinney, and averred in their declaration, that by the note the defendant promised to pay *to the order of said plaintiffs, &c.* The note, when produced was found payable to *Wardell, Van Buren & Co.*; and the plaintiffs proved that they composed a firm under that name, though nothing was said as to the firm in the declaration. The court said that if the declaration had averred that the note was given the plaintiffs by the description of *Wardell, Van Buren & Co.*, there would have been no ground of objection: and they then determined, that *there was surely no variance*: that the plaintiffs were shown to be known by the description of the payees in the note, and therefore the plaintiffs had judgment: and they rested upon *Wood vs. Bulkley*, 13 J. R. 595, where a note signed *Christ. Bulkley* was held to prove an averment of a note signed *Christopher*

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Bulkley, it being proved that the defendant usually abbreviated his name in that manner.

In *Jones et al., vs. Mars et., al.* 2 Camp. 305, the endorsees sued the drawers of a bill of exchange, and stated in the declaration that they made it, "their own proper hands being thereunto subscribed." The bill, when produced on the trial, was signed by the name of the defendant's firm, "*Mars & Co.*;" and Lord ELLENBOROUGH refused to nonsuit the plaintiff, either on that ground, or because the bill was stated in the declaration to "for value *received* in leather," and on its face it read "for value *delivered* in leather."

This case was quoted and relied on as sound law, in *Mach vs. J. S. and J. A. Spencer*, 4 Wend. 411. The declaration there stated that the defendants made their certain promissory note in writing, bearing date, &c., and then and there delivered, &c., and thereby then and there promised to pay, &c. The note when produced on the general issue, was found to be signed, "*J. S. & J. A. Spencer*;" and proof was given that it was signed by one of the defendants, and that they were partners. The court decided that *there was no variance between the declaration and the proof.*

To sustain the judgment below, upon the grounds there assumed, would be a stretch of ultra-technical refinement which, we presume, will not obtain here. We do not believe that a single authority can be found, showing such a defect, if defect it be, ever to have been ground of demurrer: and we believe that it is, in every such case, entirely unnecessary to state that the defendant made the note, by his style, or description, or abbreviation of Wm. or Chas. or J. C., or the like. We are not even required, under our law, to prove this fact at the trial, unless it is contested under oath.

The petition follows the statute strictly; and although we regard this whole matter of petition and summons as a useless and pernicious innovation on established forms, and calculated more frequently to thwart than forward the ends of justice; yet the petition here is sufficient under the law. It states that the plaintiff holds a bond *against* the defendants, *executed* to Theobald & Bain—and that is certainly equivalent to an averment that the defendants made the note. At all events, when coupled with a copy of the note, it is all the averment,

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as to the execution of the note, which the law requires, and therefore sufficient. Moreover, even at common law, it was not necessary even to aver the *signing* of a bond: to aver its sealing was sufficient.

TRAPNALL & COCKE, *Contra*:

The rules requiring certainty in pleading apply with equal force and propriety to this statutory proceeding by petition and summons. And a variance which would be fatal to a declaration, upon the same principles should be equally so to a petition. When suit is brought upon a bond for the direct payment of money, and the bond is relied upon as evidence to support the declaration, the slightest variance between the allegations and evidence, as to persons, dates, or names, will sustain a demurrer. 3 *Starkie*, 1578, 1587, and notes; *Chit.* 222.

When a declaration charged the defendant as James Cook to have made his indenture, and produced a deed signed George Cook, the variance was held to be fatal. *Mayleston vs. Palmerston*, 2 *Carr. & Payne*, 474; *Hickman vs. Shetbolt*, *Dyer*, 279; *Hutchinson vs. Piper*, 4 *Taunt.* 800.

In this case a similar difference exists. The plaintiff states that he holds a note against Grandison C. Smith, George W. C. Graves, and Claiborne Smith, and the note is signed G. C. Smith, G. W. C. Graves and C. Smith. There is no averment in the petition, or evidence in the record, that they are the same persons, and there is as great a variance in this case as in the case cited above.

In the case of *Dallam & Castleman vs. Wilson*, 4 *Monroe*, 109, which was an action by petition and summons; upon a demurrer for a variance, the court say, "to charge Dallam by the name of Dillon, or Castleman, Dallam & Co., by the name of Castleman, Dillon & Co., it must be averred that they are the same firm. The variance between Dallam and Dillon is obvious. To make them mean the same person must be done by averment of a matter not apparent in the writing, but out of it, and essential to charge Castleman, Dallam & Co., by virtue of that writing."

It is not apparent on the face of the note, that they are the same persons, it should therefore according to the well settled principle illustrated in the above case, have been averred. And such an averment

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can properly be made in a petition and summons, as decided in the case of *Rochester vs. Trotter*, 5 *Bibb*, 444; *Hensmen vs. Castleman & Co.*, 1 *Monroe* 211.

Ringo, *Chief Justice*, delivered the opinion of the court:

The petition literally follows the form prescribed by the statute; and the obligation therein set forth is a literal copy of that given as oyer: there is therefore no variance or misdescription of the writing obligatory sued on, and according to the principle recognized and established by this court in the case of *Webb vs. Prescott and Jones*, decided at the present term, there is no necessity for any formal averment in the petition that the defendant sealed the instrument, or subscribed it by any particular name or description, where the whole instrument, including the signatures and seal, is literally copied into the petition, because the statement in the petition that the plaintiff is the legal holder of a bond against the defendants to the following effect, is in such case equivalent to such averment. The judgment is therefore reversed.

JESSE SIMPSON, *against* ROBERT McDONALD.

ERROR to Pike Circuit Court.

Where a party stipulates to build a mill, which shall cut or grind a certain quantity, for an agreed compensation, and fails in the performance of the contract, he cannot afterwards recover on a *quantum meruit* count for the value of the work and labor done, and materials furnished.

But if after failure, he is permitted by the other party to go on and rebuild the mill, which work is afterwards accepted, without any objection to its sufficiency, a recovery by suit may be had of the value of such work on the implied contract.

To allow one to perform a piece of work, without a special agreement, and afterwards to accept it, raises in law an implied contract by the party for whom the work is done to pay what such work is worth.

This was an action of assumpsit, and the declaration contained three counts: two of them charging the defendant *in indebitatus assumpsit* in different ways, and the other count seeking to render him liable on a *quantum meruit*. The case was tried upon the general issue, and there was a verdict and judgment for the defendant. After judgment, the plaintiff filed his motion for a new trial, also his motion in arrest of judgment. Both motions were overruled; and he thereupon excepted to the opinion of the court, and spread the evidence adduced on the trial upon the record.

The bill of exceptions discloses substantially the following facts: The plaintiff agreed to build for the defendant a saw mill that would cut fourteen hundred feet of plank per day, and also a grist mill that would grind from seventy-five to eighty bushels of corn meal per day; and if the mills failed to perform the above stipulated quantity of work, he was, in that event, to receive no compensation whatever for building them. No time was fixed on when the mills were to be completed, nor was any price agreed on between the parties for their construction. Under this agreement the plaintiff proceeded to execute the work himself, as a mill-wright, and to superintend and direct the hands of the defendant, who seem to have been employed in helping him to build the mills. When the works were finished, the proof clearly shows that the mills were wholly valueless for

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the purpose for which they were built, and so several of the witnesses testify; and so the plaintiff expressly admitted himself.

This being the case, the plaintiff employed other millwrights to rebuild the mills, at his own expense, and upon their completion they were delivered to and accepted by the defendant, and answered the purposes for which they were built.

TRIMBLE, for plaintiff in error:

In cases sounding in tort, courts manifest much more reluctance in granting new trials than they do in cases sounding in contract. *Feeter vs. Whipple*, 8 J. R. 369; 1 Cow. Rep. 25, *Hoit vs. Hosach*. It will be granted on the weight of evidence being for the applicant, and it appears that justice has not been done.

Where the jury has found contrary to law, a new trial will be granted without payment of costs. *Van Rensselaer vs. Dole*, 1 J. Cas. 279, 336; 2 Caines R. 253; 3 Wend. 418; 4 Wend. 514; 11 Wend. 83, 192.

An entire contract cannot be apportioned; therefore, whenever an entire sum is to be paid for an entire work, the entire performance of such work is in general a condition precedent and must be established. 2 Saund. on Plead. and Ev. 958; 6 T. R. 324. On the other hand, if the work was not entire, and the defendant has affirmed it by acquiescing in the part performance, and taken some benefit therefrom, plaintiff may recover *pro tanto*. 2 Saund. on Plead. and Ev. 960; and if the work has been defectively performed the plaintiff cannot recover beyond the amount of benefit actually received by the defendant. 2 Saund. on Plead. and Ev. 961; 1 Camp. 38, 190.

No contract or agreement can be raised by a mere affirmation in discourse, or by a mere offer or overture to enter into a contract or agreement not definitely entered into by both plaintiff and defendant. 1 Saund. on Plead. and Ev. 140; *Chitty on Cont.* 4; 3 J. R. 534; 7 J. R. 470; 12 J. R. 190; 1 Caines, 584. Where the engagement is all on one side, no contract will arise. 3 D. and E. 653.

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TRAPNALL & COCKE, Contra:

From the testimony it is manifest that the plaintiff by his own express agreement undertook to make the mills cut and grind so much per day, or he would have nothing for his work. This stipulation was a condition precedent on his part, and must be performed before he could recover. It is his own express undertaking, and the rule of law is well settled, that a positive covenant cannot be excused. Covenants implied and covenants in law may be discharged by the act of God, but express stipulations seldom can. *Bohannons vs. Lewis*, 3 *Monroe*, 376. If, however, we are mistaken in giving this construction to the contract, still the finding of the jury was correct. The principle of law is well settled, that "where the plaintiff has executed his work so ill, that the defendant has derived no benefit from it, the plaintiff is not entitled to recover at all, even for labor and materials. 2 *Stark. Ev.* 97, 98. The fact that part of the work was made use of by defendant will not change the result. With regard to such jobs of work as a tailor performs in making a garment, or the cabinet-maker his furniture, much depends on the acceptance of the article made, and not objecting to it and rescinding the contract as soon as the defect is discovered. The receiving work done on a house will make no difference. Defendant could not reject it without abandoning his estate on which it was situated. It was already part of his freehold, and he received every part as it progressed, he could not object to the work and leave it on the hands of the workman without conveying away his estate, nor could the mechanic receive or sell it for his own indemnification. *Morford vs. Martin*, 6 *Monroe*, 609.

When a complete return and rescinding of the contract is impracticable, as when the contract is to build a wall or a house on the premises of the employer and the contract cannot be rescinded *in toto*, then, although the defendant has partially availed himself of the plaintiff's labor and materials supplied by him, and has not rescinded the contract *in toto*, yet it seems to be now settled that if the work has been defectively performed, the plaintiff cannot recover but on a *quantum meruit* for the labor, and *quantum valebat* for the materials to the amount of the benefit actually derived. 3 *Stark.* 1769.

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In regard to the verdict and judgment being "double," it is certainly not for the plaintiff to complain that the defendant was made to pay a part of the costs. Having failed to establish any part of his demand the whole costs of the suit should have fallen upon him. The jury and court have however adjudged a part of the costs against the defendant, and if they erred in doing so, it was to the injury of the defendant and not the plaintiff. And this court will not reverse a judgment unless the party seeking to set it aside has been injured by it.

LACY, *Judge*, delivered the opinion of the court:

Upon the first contract, which was partly express and partly implied, it is perfectly evident that the defendant was not bound, because the law raised no assumption on his part, by reason of the plaintiff's entire failure to perform his part of the agreement. Had the proof ended here, it is manifest that the defendant would have been exonerated from all liability whatever. But the testimony further shows that the first contract being cancelled, the parties subsequently entered into a second implied agreement, by which each became liable according to its terms or legal effect. The plaintiff again undertook to rebuild the saw and grist mills, and upon their completion and delivery the defendant, by an implied promise, assumed to pay a fair valuation for the work and labor done. The acts done and performed by both parties unquestionably demonstrate this to be the case.

It appears from the record that the plaintiff, at his own individual cost and expense, employed other millwrights to rebuild the saw and grist mills, and upon their completion they were delivered to and accepted by the defendant. By permitting their rebuilding the defendant agreed that the work might be done for him, and by receiving them after they were finished, he tacitly waived whatever objection he might have made to the sufficiency of the work. He thus ratified and confirmed the second implied contract by allowing the defendant to do the work for him, (for it is a maxim well settled that he who does a thing by another does it by himself,) and by receiving the mills after their completion, the law raises an implied promise on his part to pay

a fair and reasonable compensation for the labor and services performed.

The saw mill, as rebuilt, is proved to be able to cut one thousand or twelve hundred feet of plank per day, and the grist mill is capable of grinding from seventy-five to eighty bushels of corn meal during the same period of time. The mills that are built are shown to be very nearly equal in value to those the plaintiff undertook to erect in the first instance. But, be that as it may, still they are proved to do good work, and the defendant by accepting them, admitted they were rebuilt in a workmanlike manner, or in such manner as was entirely satisfactory to himself. This being the case, he thereby waived his right to object to the sufficiency of the work; and having accepted them, and being now in the enjoyment of their profits, it is surely but just and reasonable that he should be compelled to pay for their rebuilding. The defendant's liability does not, as it is supposed, grow out of his first agreement, which was cancelled and annulled; but it accrues on his second implied contract, which he wholly failed to perform. If he is bound by this contract, and that he is seems to us to be almost self-evident, then it must necessarily follow that both the verdict and judgment of the court below were manifestly erroneous, being expressly and violently contrary to the justice and right of the case. If this position be true, the court also erred in not granting the plaintiff a new trial on his motion. The judgment must therefore be reversed, and a new trial awarded.

BANK OF THE STATE OF ARKANSAS against JAMES CLARK, AND OTHERS.**APPEAL from Arkansas Circuit Court.**

In debt upon a bond it is sufficient and proper to aver that by his writing obligatory, &c. the defendant "*promised to pay.*"
In a suit by the State Bank on a note or bond executed to that institution, it is unnecessary to aver that by the non-payment of the note or bond the defendants became liable to pay interest at the rate of ten per centum per annum; or to negative in the breach the payment of such interest.
The court is bound judicially to know what the legal interest is, and to give judgment accordingly.

The plaintiff instituted an action of debt against the defendants in the Circuit Court of Arkansas county, and declared, in the usual form, in action of debt. "For that whereas the said defendants heretofore, to wit: on the third day of June, A. D. 1839, at the county of Arkansas, by their writing obligatory, signed by their respective styles, of James Clark, John Thompson, Jr., Robert S. Connell and Benjamin Thompson, sealed with their seals, now to the court here shewn, bearing date the day and year aforesaid, *promised* that they the said James Clark as principal, and the said John Thompson, Jr., Robert S. Connell and Benjamin Thompson, as securities, jointly and severally would pay, four months after the date thereof, to the said plaintiff, or to her order, the sum of thirteen hundred dollars, above demanded, negotiable and payable at the branch of the Bank of the State of Arkansas at Arkansas, without defalcation, for value received; whereby, and by force of the Statute in such cases made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum above demanded, with interest thereon from the time the same became due and payable, according to the tenor and effect of said writing obligatory, until paid, at the rate of ten per cent. per annum." The queritur and breach were technically formal; and the payment of debt demanded, or any part thereof, or of the interest thereon, accruing as aforesaid, or any part thereof, was expressly and appropriately negatived in the

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latter. To this declaration the defendants demurred, without expressing in their demurrer, specially, any defect or imperfection whatever; and the plaintiff joined in the demurrer; which, upon argument and consideration was sustained, the declaration adjudged insufficient, and a final judgment given against the plaintiff. From which she appealed.

PIKE, for plaintiff in error :

We shall not occupy the time of the court by argument upon a question that is settled by its own adjudication. No causes of demurrer being assigned, and the declaration [showing a sufficient cause of action, it was error to sustain the demurrer, and the judgment must be reversed.

An inspection of the declaration would induce the court to wonder on what ground the court below decided. We have been informed that two reasons were assigned for the decision: First—that the declaration states that by the writing obligatory sued on, the defendants “*promised*.” Second—that the declaration states the liability by statute to pay interest at ten per centum per annum.

The first ground seems to be a misapplication of the common principle that a covenant or bond may be declared on according to its legal effect—a principle which does not apply, and if it did, still does not prevent declaring according to the words used in the instrument.

It is true that in the forms laid down in the books of precedents, the statement of the obligation generally is in the words “*acknowledged himself to be held and firmly bound,*” or “*became bound,*” &c., because many bonds are couched in that language; but these words are a mere form, and are not the “*legal import*” of the obligation. A bond or obligation is defined to be “*a deed, whereby the obligor or person bound obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed.*” 1 *Jacobs* 350. Certainly to *promise* to pay, and to *oblige* one’s self to pay are the same thing. Again it is said to be called a specialty, because the debt is therein particularly specified in wri-

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ting, and the party's seal *acknowledges* the debt or duty, and confirms the contract. *Id.* 351.

The rule as to stating a deed is clearly laid down by *Wilson, J.* in *Whiteman vs. King*, 2 H., Bla. 11. He says, "I take it to be a clear rule in pleading, that a party may state a deed, and leave the court to determine what is the operation of it. If the legal operation of the deed is misstated, the plea is bad; *but if the deed is only stated without its legal operation it is good.*"

It certainly cannot be contended that the legal operation of this bond is misstated. Its legal operation is simply that of a single bond for money, and that legal operation appears from a promise to pay, as well as from an acknowledgment of indebtedness. The promise to pay, is the major, and includes the indebtedness, which is the minor. The rule laid down in *H. Blackstone* has been ever since recognized as correct; and, as stated by *MARCY, J.* in *Scott vs. Leiber*, 2 Wend. 479, "It is a general rule in declaring, that contracts must be set forth *in the words in which they were made*, or according to their legal effect. 1 Ch. Pl. 299.

As to the other point, a special statute gives ten per centum interest on all notes due the Bank, not paid at maturity. This being a liability not created by the *letter* of the contract, it was necessarily averred. If it was not necessary to aver it, it is mere surplusage.

And the court having suggested a desire to hear discussed the validity of the law giving interest at the rate of ten per centum per annum on notes and bonds executed to the State Bank, after due, the following further argument was filed by

PIKE, for plaintiff in error:

The question is presented whether the provision in the act of March 3, 1838, authorizing the State Bank to recover interest at the rate of ten per centum per annum on all notes, &c., not paid when due, is void, as contrary to the provision in the charter which fixes the highest rate of interest to be taken by the bank *in advance at eight per cent.*

If it be void, it can only be so because it is such a modification of

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the charter as impairs the obligation of a contract. The same power which enacted the charter could undoubtedly modify and change it in any respect, were it not for the provision in the National Constitution prohibiting the States from passing any law impairing the obligation of contracts.

A *contract* is defined to be a compact between two or more persons. *Fletcher vs. Peck*, 6 *Cranch*, 136. It has also been defined an agreement to do, or not to do, a particular thing. *Sturges vs. Crowninshield*, 4 *Wheaton*, 197.

The obligation of every contract will consist of that right or power over one's will or actions, which he, by his contract, confers on another. 3 *Story Com. on Const.* 243.

Contracts and grants made by the Legislature of a State are within the clause, and when made become irrevocable, and cannot be constitutionally impaired. *Fletcher vs. Peck*, *ub. sup.*; *New-Jersey vs. Wilson*, 7 *Cranch*, 164; *Terrett vs. Taylor*, 9 *Cranch*, 52; *Town of Pawlet vs. Clark*, 9 *Cranch*, 535.

Upon the subject of charters it is laid down that the contracts spoken of in the Constitution were those which respected property, or some other object of value, and which conferred rights capable of being asserted in a court of justice. *Dartmouth College vs. Woodward*, 4 *Wheat.* 518, 629.

A charter is declared to be a contract, because, "it is a grant of powers, rights, and privileges; and it usually gives a capacity to take and to hold property." A charter granted to *private persons*, for *private purposes*, is said to be within the terms and the reason of the prohibition, because it confers rights and privileges, upon the faith of which it is accepted. It imparts obligation and duties on their part, which they are not at liberty to disregard; and it implies a contract on the part of the Legislature that the rights and privileges so granted shall be enjoyed. 3 *Story, Com. on Const.* 259.

Again it is laid down that "as to public corporations which exist only for public purposes, the Legislature may change, modify, enlarge, or restrain them." That "if a charter be a mere grant of political power, if it create a civil institution, to be employed in the administration of the government, or, if the funds be public property alone,

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and the government alone be interested in the management of them, the Legislative power over such charter is not restrained by the Constitution, but remains unlimited. 3 *Story, Com. on Const.* 260, 261.

These principles are indubitably correct, for they are sustained by the highest authority in the country. Let us inquire then whether there is any contract implied or contained in the charter of the State Bank? Not so, for it is not an incorporation of private persons, but a mere law regulating and giving certain powers to the treasury of the State. There are no contracting parties—and no powers, rights, or privileges are by it conferred upon any person or set of persons. The funds of the bank are the funds of the State, the profits of the bank are the profits of the State, and the debtors of the bank are the debtors of the State.

There being no contracting parties, there is no contract; and of course the obligation of no contract is impaired by the law of 1838, or any law modifying or extending the charter.

Furthermore, as this charter confers no rights and privileges, so also it imposes no obligations; and in one word, the *State* and the *People* of the State generally are the only parties concerned, and private rights are in no manner guarantied or affected by the charter.

In *Allen vs. McKeen*, 1 *Sumn.* 297, Mr. Justice STORY said, “public corporations are such only as are founded by the Government for public purposes, where the *whole interests* belong to the Government,” reiterating the language of the Supreme Court in the case of *Dartmouth College vs. Woodward*. In that celebrated case the very point here at issue was decided. The Supreme Court said, “for instance, a bank created by the Government for its own use, whose stock is exclusively owned by the Government, is, in the strictest sense, a *public corporation*.”

Moreover, to extend or increase the rate of interest to be taken by a bank, even if a *private* corporation, would not be impairing the obligation of the contract. The contract in such case is between the Government and the corporators. They are the parties. Certainly to increase the rate of interest which they might take would not be impairing the obligation of the contract. The contract, for example, in the charter in this case, supposing the bank to be a private corpo-

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ration, is, that she may take interest as high as eight per cent., and that the Legislature will never, by diminishing the rate of interest, deprive her of her profits. To increase the rate of interest is to add and grant a *new* privilege, instead of taking away one already granted.

We conceive that this question can present no difficulty; and that the act of March 3d, 1838, is in full force as the law regulating contracts made with the bank—regulating certainly all such contracts made subsequent to its passage.

RINGO, *Chief Justice*, delivered the opinion of the Court:

The only question presented by the record is whether the declaration is sufficient in law; or was the demurrer thereto rightly sustained? The declaration is in point of form strictly and technically right, and we are at a loss to conceive the ground upon which it was adjudged insufficient. The pleader, it is true, in describing the obligation of the defendants, employed language somewhat different from that usually found in the ancient forms and precedents, but the language used is literally the language of the contract, and imports an obligation as effective in law as that usually adopted in the precedents, and if it could ever have been objectionable, as matter of form, it must be conceded that our statute has effectually cured the objection by declaring that "no person shall be prejudiced by neglect of the ancient forms and terms in pleading; so that the matter fully appear in the process, declaration, petition, statement, or other pleading;" and requiring the parties to express in every demurrer the defect or imperfection of the pleading demurred to; while they are prohibited, by the same statute, from setting out therein any defect or imperfection "that would be cause of special demurrer at common law;" and the court is expressly required to amend every such defect or other imperfection in the pleading "other than those which the party demurring shall express in his demurrer." *Rev. St. Ark., Ch. 116, S. 59, 60, 61, p. 627-8.* The contract, as set forth in the declaration, contains no stipulation for the payment of interest, and therefore, as the interest thereon is prescribed and given by a general law, and can be regarded only as a legal consequence of the failure to pay the

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debt or discharge the obligation at maturity, or on the day when it became due, and payable according to law, or the express agreement of the parties, a special averment in relation thereto is unnecessary, and must be regarded as surplusage: because the facts which entitle the party to interest being shewn, the court is bound to know, judicially, what the legal interest is, and pronounce judgment for it if the plaintiff obtains judgment for the debt demanded.

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PHILLIPS and MARTIN against THE GOVERNOR, FOR THE USE, &c.

ERROR to Crawford Circuit Court.

Upon administrator's bonds, made payable to "the Governor and his successors in office," the right of action is not restricted to the *immediate successors* of the Governor in whose name such a bond may have been taken.

Any remote successor of such Governor may sue on such bond, and state himself to be the successor of such Governor to whom the bond was executed, without noticing the intermediate Governors.

And in such case the declaration may state the bond to have been made "to the plaintiff."

Under 8th and 9th Wm. III, substantially re-enacted in the Territory of Arkansas in 1834, the plaintiff, in actions on penal bonds, was compelled to assign or suggest breaches; and unless the condition and breach both appeared on the record, the proceedings were erroneous.

In a bond executed to the Governor, and his successors, by an administrator, &c., the Governor holds the legal interest as a naked trust, and no injury appears to have been sustained by the *cestui*, for whose use the suit is brought, until a special breach or breaches are assigned.

In such suit, therefore, each breach must specially state the facts on which the right of action of those for whose use the suit is brought depends; with as much certainty and precision as is required in the counts of a declaration.

If the plaintiff fails to suggest or assign the proper breaches no cause of action is shown to have accrued.

A breach is well assigned, if in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import or effect.

And where, on such a bond, the breach amounts merely to a general statement that the administrator has done nothing which he was bound to do, it is fatally defective.

If a suit on such bond is brought for the use of heirs, they must show by positive and specific averments their interest in the estate; and how, and in what manner they have been deprived of their interest in the estate by the devastavit of the administrator.

Under the Revised Statutes, in suits on penal bonds, the jury must be sworn to inquire into the truth of the breaches, as well as to assess the damages: and the judgment must be entered for the penalty of the bond, with costs; and the plaintiff have execution for the damages.

This was an action of debt, on an administrator's bond, commenced by "James S. Conway, Governor of the State of Arkansas, and successor of John Pope, Governor of the late Territory of Arkansas, for the use and benefit of Samuel Dennis" and others, as heirs of David Trimble, deceased, against the plaintiffs in error, together with Greenup D. Womsley, on the bond of Womsley as administrator of the estate of David Trimble, dec'd, in which bond the plaintiffs in error were securities. The declaration demands \$8,000, the penalty of the bond, and states that the defendants on the 22nd day of August, in the year eighteen hundred and thirty-four, at Crawford county,

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made their writing obligatory, by which they, together with one Thomas Phillips, since then deceased, acknowledged themselves held and bound *unto the said plaintiff* in the sum of eight thousand dollars: the condition of the bond is then recited, in the common form of such bonds: it is then alleged that the persons for whose use the suit was brought, are the sole heirs at law and legal representatives of said David Trimble, dec'd, and as such are entitled to have and receive the whole amount of said estate, after a fair administration thereof, the amount of ten thousand dollars. Then follows the breach in these words:

“And the said plaintiff avers that at the time of the death of the said David Trimble, deceased, he died possessed of a large estate of goods, chattels, slaves, notes, accounts, dues and effects, to wit: the amount of twenty thousand dollars, which then and there came to the hands, possession and knowledge of the said Greenup D. Womsley, administrator as aforesaid, to be administered upon by him according to law. Yet the said Greenup D. Womsley, administrator as aforesaid, hath wholly failed and refused to make, or cause to be made, a true and perfect inventory of said estate according to law, which did come to his hands, possession, or knowledge, and to the hands and possession of any person for him, nor did he make due return and exhibit in the office of the Clerk of the county of Crawford according to law, of all and singular the goods and chattels, rights, and credits, of the deceased, which did come to the hands, possession, and knowledge of him, said administrator, nor did he well and truly administer the same according to law, and pay the debts of said deceased as far as the assets did extend, nor did he make such distribution and disposition of said estate as the law directs, in this that there were debts to the amount of \$1,000, and distributive shares due said Samuel, &c., who have sued to the amount of \$10,000, which were then and there due, which he failed to pay and satisfy according to law and his duty as administrator, to wit: at the time when, &c., aforesaid, in the county aforesaid. And further, that the said administrator did not make, or cause to be made, a true and just account of his said administration, nor did he make due and proper settlement thereof from time to time, according to law, nor the sentence or decree of any

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court whatever; nor hath he well and truly kept and performed his said condition in any thing whatever, but has wholly failed in every respect to keep the same. By reason of which said several breaches the said action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of \$8,000, the penalty above demanded, yet the said defendants, although often requested so to do, have not as yet paid the said sum of eight thousand dollars above demanded, or any part thereof to the said plaintiff, or to any other person or persons whatsoever. Nor have they, or either of them, paid the distributive shares aforesaid, due and payable to the said Samuel, Christina, Elvira, Marina, Romulus and Alfred, or either of them, or to any person for them. But hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do. To the damage of the said plaintiff twenty thousand dollars, and therefore he sues," &c.

To this declaration, on the 30th day of March, A. D. 1839, the plaintiffs filed their general demurrer, which was overruled, and they made no further answer: whereupon it was "considered by the court that the plaintiffs ought to have and recover of and from the defendants all of their damages by them sustained by reason of the breach of covenant aforesaid, but because the court is not sufficiently advised what damage the said plaintiffs have sustained, it is ordered that a writ of inquiry issue," &c. — "to inquire into and assess the damages sustained by said plaintiffs by reason of the breach of covenant as aforesaid."

At September term, 1839, a jury was returned who were sworn to "well and truly try and damages assess, and true verdict render according to evidence;" and returned their verdict that they assessed the plaintiff's damages by reason of the breaches of covenant in the plaintiff's declaration set forth, to the sum of \$3,217 15 cts.; for which sum and costs the court rendered judgment in favor of the plaintiff.

PRER, for plaintiff in error:

It is contended by the plaintiff in error: first, that the court below erred in overruling their demurrer to the declaration: and second, that the proceedings subsequent thereto are wholly irregular and erroneous.

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This court, in the case of *Lyon vs. Evans*, 1 Ark. 386, has laid down the law as to assigning breaches in such an action as the present most clearly and explicitly, and in conformity with previous decisions upon the subject. The court says that the causes of action set forth in the breaches assigned, are to be considered as the gravamen, or real foundation of the recovery—that the persons for whose use, &c., are the *real plaintiffs* in the case, and that their interest in the performance of the condition, and the injury done them by a breach of it, do not appear until some special breach is assigned, and their interest and damage specially shown—so that, of necessity, *every* breach must state the facts on which their right of action depends, with as much precision and certainty as is required in the several counts of a declaration. And the court declares that every breach must have all the essential requisites of so many different counts in a declaration.

If the law, thus expounded, needed to be sustained by authority elsewhere, it may be readily found. Thus in the *People vs. Russell and Wood*, 4 Wend. 570, it was declared that where a breach gives no data from which damages can be assessed, it is not sufficient. So in the *People vs. Brush*, 6 Wend. 454, it is also said that a breach is well assigned, if it be in the words of the contract, either negatively or affirmatively, or in words co-extensive with the import and effect of it; that this is not only the general, but perhaps the universal rule, where the contract or condition of the bond provides for a single act to be done; but where it requires many things, the omission of any one of which would constitute a breach, a particular breach should be specified in the assignment. The object of an assignment of a breach, it is said, is to apprise the party of what he is called on to answer.

Testing the present declaration by these rules, it is undeniably bad. It is utterly shapeless and without form or substance. If considered as containing but one breach it is bad for duplicity; and certainly there is no attempt according to any of the known rules or forms of pleading to assign several breaches. See for the forms, 1 *Chit. Prac.* 424, 425; 3 *Chitty Plead.* 1179, 1180; *Story Plead.* 325. In fact the declaration seems intended to cover the whole condition, and the breach is precisely the same as though it had alleged that the said

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Womsley had done nothing which he was by the condition required to do; which would of course be bad. 6 *Wend.* 454; 7 *Price*, 550.

At common law the plaintiff could assign but one breach; and Chitty lays it down that the St. 3 and 9 Wm. 3 c. 11 s. 8, which is nearly the same as our statute, and authorizes several breaches to be assigned, requires them to be assigned as at common law, not merely in the words of the condition, but specially stating the facts. 1 *Ch. Pl.* 618. And the right to assign several breaches, does not allow duplicity any more than does the right to plead several pleas. This declaration must be considered as containing but one breach, because there are no forms observed which separate its incongruous materials into different breaches. The meaning of duplicity, as to a declaration, is, that it must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported; and as to subsequent pleadings, that none of them is to contain several distinct answers to that which preceded it. The present attempt at an assignment of breaches would be bad, either in a declaration or replication. *Stephen* 251.

On demurrer, if there be one good breach out of several, the demurrer is overruled. This imposes the necessity, where there are several breaches, of several demurrers. How could several demurrers be framed to this declaration? The wit of man could not distinguish the dividing line between the breaches, if there are several.

And it is undoubtedly true that if there be some good and some bad breaches, and on the trial damages are assessed generally, it is bad. *People vs. Brush*, 6 *Wendell*, 458. And thus even if one breach, or part of a breach be good, still the judgment is erroneous, because it is general, on the whole declaration. *Haggin vs. Williamson*, 5 *Mon.* 10.

This is a suit for the use of heirs. Of course they are only entitled to maintain it in one event, and in order to do so, must show in the declaration by sufficient and positive averments their interest in the estate, and how they have been deprived of that interest. The breach in this case does not aim at this, but rather at showing that the administrator had done no act whatever, and the failure of the admini-

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trator to pay the debts of the estate is alleged in the same breath with his failure to pay their distributive shares, as a cause of action to the heirs. In truth it may be seriously questioned whether the allegation that the distributive shares were due and owing, does not show a several interest in each plaintiff, which would preclude a joint suit.

The declaration is so completely insufficient that it is only necessary to point to a form book, and the first principles of pleading, to show that no judgment on it can be sustained.

Second: The subsequent proceedings are erroneous. The jury was not summoned or sworn to inquire into the truth of the breaches, but merely to assess the damages sustained by reason of *the breach of covenant*, and have returned no verdict as to the truth of the breaches, as required by our statute; nor is the judgment entered for the penalty at all, but merely for the damages assessed. *Rev. St. 609.*

But it is manifestly unnecessary in this case to do more than advert to these errors. The court will take notice when the State Government was formed, and when the Governor took his seat, as in England they notice when the King comes to the throne. This suit is brought in the name of Governor Conway, successor to Pope, who was successor to Fulton, Governor. It is brought on a bond executed in 1834, and which is alleged to have been made to the *plaintiff*. The court will notice that the averment is of an impossibility, and this point of itself is sufficient to decide the case.

WALKER, *Contra:*

LACY, *Judge*, delivered the opinion of the court:

It is contended on behalf of the plaintiffs in error that the court below erred in overruling the demurrer to the declaration, and that all the subsequent proceedings are consequently irregular and illegal.

Before we proceed to determine this point, it may be well to notice and dispose of another objection urged by the plaintiff in error. It is said the action cannot be maintained because the suit is brought in the name of James S. Conway, Governor of the State of Arkansas, as the successor of John Pope, late Governor of the Territory as afore-

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said, when in truth and fact the plaintiff was the successor of William S. Fulton, Governor of the Territory as aforesaid; that the, &c., the bond, upon which the suit is instituted, was executed in 1834, and the allegation in the declaration is, that it was made to the plaintiff in the action, and therefore this court is bound judicially to take notice when the State Government was formed, and when the present acting Governor entered upon his official duties; and that this being the case, it follows that the present plaintiff was the successor of Governor Fulton, and not of Governor Pope. We are unable to perceive the force or reasons of this objection. The statute authorizing the execution of administrator's bonds makes them payable "to the Governor and his successors in office." This is the express language of the act. The object and design of the statute was to vest in the Governor and his successors the right of action whenever a breach occurred on the condition of the bond. It does not confine or restrict this right to the Governor and his immediate successor in office, but it gives it to him and his successors, thereby clearly authorizing the suit to be brought in the name of any person who may be legally chosen to fill the office. The office itself, in legal contemplation, is always *in esse*, and it matters not to whom the bond was executed; if there is a breach upon it, the right of action accrues to him who is the acting Executive at the time of the institution of the suit, and of course such person is the legal successor of him to whom the bond was executed. This being the case, the suit is properly brought in the name of the present plaintiff as the successor of John Pope, late Governor of the Territory of Arkansas.

This suit is prosecuted in the name of the Governor for the use and benefit of the heirs and legal representatives of David Trimble, deceased, against the administrator of said estate, and the securities upon their official bond, under the provisions of an act of the General Assembly of the Territory of Arkansas, passed in 1831, which declares that "in all actions upon any bond or penal sum for non-performance of covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit." This act is substantially the same in

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most of its provisions, as the act of 8th and 9th Wm. III, and the decisions upon that statute may be regarded as strictly applicable to the one now under consideration. Under the statute of William it has been held that the plaintiff is compelled to assign or suggest breaches, and if he fails to do so, he cannot recover. Unless the condition and the breach appear upon the record the proceedings will be erroneous. 5 T. R. 633, 538; 2 Wilson, 337. And such we apprehend is the legal and legitimate operation of the act of 1831, and so it has been determined in the case of *Lyons vs. Evans, and others*. 1 Ark. 367.

The bond upon which the suit is instituted is made payable to the Governor and his successors in office, and the jury upon the trial are required to assess damages for each of the breaches that the plaintiff alleges, and that are proved to be broken. The Governor holds the legal interest in the bond in his official character, as a naked trustee for the benefit of those for whom the suit is instituted, and the injuries resulting from the non performance of the condition of the bond, do not appear until some special breach or breaches are suggested and assigned, and the damages specially shown or proven. Therefore, every breach must state the facts specially upon which the plaintiff's right of action depends, and must allege them with as much certainty and precision as are required in the count or counts of a declaration. The breaches appear in every point of view to answer the same purposes as counts in a declaration where the form of proceeding is different, and therefore if the plaintiff fails to suggest or assign proper breaches upon the record, no cause of action accrues. This is the undoubted rule upon the subject, for the breaches assigned are to be considered as the gravamen or real foundation of the recovery; consequently the persons for whose benefit the suit is brought are the real plaintiffs, and of course they must show a good cause of action, or upon general demurrer the declaration will be held fatal. *The People vs. Russell and Wood*, 4 Wend. 570; *People vs. Brush*, 6 Wend. 554. A breach may be considered well assigned if it be in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import or effect. The object of the assignment of a breach, is to apprise the opposite party of what he is called upon to answer. By applying the rules above stated to the declaration now

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under consideration, we will be enabled to perceive whether or not the breaches are properly assigned.

In the present instance the declaration seems designed to cover the whole condition of the bond, and it contains but a single breach, which amounts to nothing more than this, that the said administrator had done nothing which by law he was bound to do. Such a breach is fatally defective, for it contains neither substance nor form, and it expressly contradicts all the known rules and precedents of pleading. 1 *Chit. Pl.* 424, 425; 3 *Chit. Pl.* 1179, 1180; *Story Pl.* 325. There is certainly but one breach contained in the declaration, for it possesses no separate or component parts assigning different breaches. It simply sets out the condition of the bond, and then negatives them in general terms, without alleging any specific facts upon which the defendants' liability depends. This is a suit for the use of heirs, and of course they are only entitled to maintain the action in the event that they have been damnified. In order to do this, they are bound to show by positive and specific averments their interest in the estate, and how and in what manner they have been deprived of that interest by the devastavit of the administrator. The declaration cannot be regarded as containing any one substantial breach. It seems to rely solely upon the fact that the administrator had not performed his duty according to law, and it lays the breach to pay the debts of the deceased in the same clause with that to pay the distributive shares of the heirs. In all the breaches it attempts to set forth there is no specific cause of action alleged with reasonable certainty or precision, and of course it is fatally defective upon demurrer.

Again the finding of the jury is not in conformity with the statute regulating the practice in such case, and of course the subsequent proceedings are erroneous. The act in relation to judgments obtained upon demurrer, or by confession, or default, upon penal bonds, requires that "the court shall make an order therein that the truth of the breaches assigned be inquired into, and the damages sustained thereby assessed. And the judgment in such action shall be entered for the penalty of the bond, together with costs of suit," and that the plaintiff have execution for the damages so assessed. *Rev. Stat.* 669, sec. 7 and 8. Neither of these requisites is contained in the order

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or judgment of the court. The record merely states that "the jury was sworn well and truly to try, and damages assess, and a true verdict render according to evidence," and they assessed the damages sustained by reason of the breaches of covenant for a given sum. There was no verdict as to the truth of the breaches, nor judgment for the penalty of the bond as the statute requires. The judgment of the Circuit Court must therefore be reversed.

JAMES HANNA, against HENRY HARTER.**ERROR to Washington Circuit Court.**

When such a contract is alleged in the declaration, as if proved or admitted, would justify the recovery of a sum exceeding one hundred dollars, the jurisdiction of the Circuit Court, in such case, can only be questioned by a plea in abatement. A motion to set aside the verdict, and grant a new trial, should be sustained, whenever it appears that the evidence adduced at the first trial wholly fails to support the allegations of the declaration; and it is error to refuse a new trial in such a case.

This was an action of assumpsit. *Harter* sued *Hanna* upon an alleged agreement, by parol, that the latter would sell and deliver the former twenty-six pork hogs, to be delivered at *Hanna's* house by a certain day, for four dollars per hundred weight. The declaration contained a statement of this contract in each count, and alleged that on the day fixed, *Harter* went to *Hanna's* house, tendered the money, and demanded the hogs, and that *Hanna* refused to deliver them, and never did deliver them. The damages claimed were two hundred dollars.

Hanna first filed his plea in abatement, that the sum in controversy was under one hundred dollars. Demurrer to this plea was sustained. He then pleaded in bar, that the cause did not accrue one day before the commencement of the suit; and also non assumpsit. To the former, demurrer was sustained; and the issue on the latter was tried by a jury, and a verdict rendered for thirty-one dollars and twenty cents.

Hanna on the 23d of May, 1839, moved for a new trial, on the grounds that the jury decided "contrary to the instructions of the court, against law, and without evidence." This motion was overruled, on the same day, so far as the record shows; and on the first day of June, *Hanna* filed his bill of exceptions to the refusal to grant a new trial, setting out the evidence. The evidence so placed on the record was, that the witness stated *Hanna* said that he had sold his pork to *Harter* at four dollars a hundred; but if they disagreed, he would let the witness have a thousand pounds at fifty dollars. An-

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other witness stated that Hanna told him that he had sold his hogs at four dollars a hundred to a man who was with him, whom the witness did not know. Another stated that he heard Hanna say that he did not know whether Harter would get his hogs or not; that he was to have them, but there were small ones among them, and if he did not take all, he should not have any: and then stated that he bought twenty-seven hogs of Hanna on the 27th of December, 1837, (the day stated in the declaration, when the hogs were to be delivered.) Another stated that on the 26th of December, 1837, he went with Harter to Hanna's house. Harter told Hanna that he had come for the hogs. Hanna said that he would let him have all they could agree upon. They went to the lot and disagreed about the weight. Harter said he was to have 24 or 25 head. Hanna said that the contract was to have all that got fat, if they could agree.

After taking his bill of exceptions, Hanna moved in arrest of judgment, and the motion was overruled.

WALKER, for plaintiff in error:

The Circuit Court should have overruled the demurrer to the plea in abatement. The plea is drawn in accordance with a form in Story's Pleadings. In 1 *Marshall*, 386, 410, there is a case in point, an action of covenant, whereby the party agreed to pay all costs which might accrue; plea that the costs did not amount to a sum sufficient to give the Circuit Court jurisdiction. The plea in abatement, was demurred to, it is true, and a plea in bar entered; it is submitted to the court whether the previous decision of this court, upon the subject of pleading over after demurrer, does not alone apply to pleas in bar. The court should have arrested the judgment, the sum in controversy was less than \$100.

There is another ground upon which the plaintiff in error confidently relies, which is this, that there is no evidence whatever of a contract between the parties corresponding with that in the declaration. There is no evidence of the value of the pork at any particular time or place. It is true that one witness said he would buy \$50 worth at a certain price, but when that was is not stated. Another witness stated that in his neighborhood pork was worth \$4 50 or \$5 00. But

where did he live? Where was his neighborhood? The criterion for damages should be the value of pork at the time it was to have been delivered. The contract was never proven as laid, the statements of the parties are alone relied on; one party said it was to deliver a certain number of hogs, the other said it was a conditional contract to deliver such hogs, when they got fat, as they could agree upon, &c.

But the defendant in error declared himself that the contract was different from that laid in the declaration as to the number of hogs to be delivered.

GILCHRIST, *Contra*:

The court was correct in overruling the demurrer to the declaration, because sufficient appears on the face of said declaration to authorize the plaintiff to recover. The demurrer admits every reasonable and legal intendment in the declaration.

The court acted correctly in sustaining the demurrer to the plea in abatement, because the damages laid are two hundred dollars, which is within the jurisdiction of the court, and is the only evidence and fact upon which the court can act.

The damages being unliquidated and uncertain, the court can look to the damages laid in the declaration only as the true criterion of damages. 1 *Bibb's Rep.* 318, 402; 5 *Cranch Rep.* 13; 2 *Bibb*, 265, 4 *Cranch Rep.* 316; 7 *Monroe*, 216.

DICKINSON, *Judge*, delivered the opinion of the court:

According to the principles established by this court in the case of *Heilman vs. Martin*, the jurisdiction of the Circuit Court can only be questioned by a plea in abatement, where the facts as shown by the declaration, present a contract upon which the plaintiff may, if the same be admitted or proven, legally recover a sum exceeding one hundred dollars. In the present case, the damages are unliquidated, and the plaintiff upon the contract as set out in his declaration, might, if the proof justified it, legally recover upon the contract as set out in each count in the declaration, more than that sum. The court therefore, *prima facie*, had jurisdiction of the cause, and the defendant

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could not controvert the same, otherwise than by plea in abatement showing affirmatively such facts as in law would divest it of its apparent right to adjudicate the case; which he in fact attempted to do, but subsequently waived by pleading to the action in bar thereof, whereby he rested his case alone on the general issue, and like every other suitor is now bound by law to abide the consequences of his own acts. The only question therefore to be decided is does the proof shown by the record establish and sustain the contract as laid in the declaration? The contract specially set out is that the defendant below on the 15th of November, 1837, agreed to sell to the plaintiff 26 head of pork hogs, to be delivered at the defendant's dwelling house on the 26th day of December following, for which he was to be paid at the rate of four dollars per hundred.

Does the proof support this allegation? The first witness says that the defendant told him he had sold his pork to the plaintiff at \$4 per hundred if they agreed. The second witness said that the defendant below informed him he had sold his hogs to a stranger then in company at four dollars per hundred, but he did not know the stranger's name, and that he heard him also say to his sister-in-law that he did not know whether the plaintiff would get his hogs or not, and that if plaintiff refused to take all, he should not have any of them. The third witness stated he was employed by the plaintiff to collect the hogs he had purchased, and he heard the plaintiff tell defendant that he had come for the hogs. To which the defendant replied that he would let him have all they could agree upon in regard to their weight. They disagreed as to their weight; the plaintiff alleging that he was to have 24 or 25 head according to the contract. The defendant insisted that he was to take all of them that were fat.

This is the substance of all the proof. - For the bill of exceptions states that it was all the evidence given upon the trial. The testimony certainly does not prove the contract as laid. The proof, if it establishes any contract at all, which is exceedingly questionable, only establishes a conditional agreement which is every way indefinite as to its terms, and as to the number of hogs to be delivered. The allegation of the declaration is that it was a positive sale of 26 head of hogs depending upon no contingency whatever, which were to be

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delivered in six weeks from the 15th of November, 1837, at the defendant's house, at four dollars per hundred, and the defendant's failure to comply with this contract constitutes the plaintiff's cause of action. The proof certainly wholly fails to support the allegations of the declaration, and of course the jury were not warranted in finding for the plaintiff, consequently the court below erred in rendering judgment upon the verdict, and in not granting a new trial to the defendant. This being the case, the judgment of the court below must be reversed.

EBENEZER HANNA against HENRY HARTER.**ERROR to Washington Circuit Court.**

To sustain an action on special contract, the proof must correspond substantially with the agreement, as laid in the declaration
 In estimating the damages arising from a breach of contract, in failing to deliver goods according to agreement, the difference between the price agreed on, and the marketable price of the same property at the time fixed upon for the delivery, must govern the jury.

This was an action of assumpsit, upon a parol agreement, by which Hanna sold to Harter ten head of hogs, to be delivered six weeks from the date of the agreement, at Hanna's residence, upon the delivery of which, Harter was to pay him four dollars per hundred for the pork. Demurrer to the declaration being overruled, the plea of non-assumpsit was filed, and upon trial of the issue judgment was rendered in favor of the plaintiff below for nine dollars, and costs.

On the trial the court permitted the plaintiff below to prove the price at which Hanna sold his pork to other persons; and this testimony being objected to, was set out in a bill of exceptions, taken to the decision admitting it. The proof substantially sustained the contract and breach as set out in the declaration; but there was no evidence as to the marketable price of the pork at the time when Hanna should have delivered it. Motions for a new trial, and in arrest of judgment were overruled.

WALKER, for plaintiff in error:

The declaration contained no averment of special damage, and it was error to permit evidence of special damages to go to the jury; and for that cause a new trial should have been granted. In 1 *Chitty*, page 332, it is distinctly laid down, "that unless the damages be such as necessarily follow the breach of contract, the plaintiff must declare, specially, what injury he had sustained." Did the plaintiff ne-

cessarily sustain any damages from the breach of contract? It might have been to his interest not to complete the trade: if pork had fallen in value it certainly would: and in Saunders' Pleading and Evidence it is laid down, "that the damages to be recovered *must be proximate*, not dependent on contingency. It will be of no avail to state in the declaration that the plaintiff was prevented from completing an advantageous contract." And from the same authority, page 157, "they must, if they be not the *necessary* result of the breach of contract, appear upon the declaration, and be proven accordingly." Saunders, at the same page, and Chitty, page 296, treat of damages upon a breach of contract for not delivering goods sold, or accepting them, as special damage. The proof of the special damage was inadmissible unless the plaintiff had declared, specially, the injury; but from the declaration it is impossible to say in what the damage consists, and the whole office of the declaration is omitted. The proof does not sustain any contract, either general or special. At the time the agent applied for the pork the time of delivery had elapsed, and the defendant was bound to perform all that was required of him; that is, he must be there on the day, and hold himself ready to perform his part of the contract. Upon each of these grounds it is insisted a new trial should have been granted.

As to the other point, (the motion in arrest of judgment,) it is true the declaration claims \$200 damages, but from the contract set out it is manifestly clear that the Circuit Court had no jurisdiction of the case. The defendant demurred to the declaration on this account, but as there was afterwards a plea, the defendant may not avail himself of the objection.

In the case of *Berry vs. Linton*, decided at the July term, 1838, this court decided that where the want of jurisdiction is apparent on the record no plea is necessary; and that the contract as disclosed by the pleading, and not the sum demanded is the true criterion by which the court shall test its jurisdiction. The same decision was made at the last term of this court in the case of *Hall and Childress vs. C. Fisher*, and is sustained by 7 *Monroe* 220, 1 *Bibb* 71, *Hardin* 444. In the case of *Frasier vs. Shuttle*, *Missouri Rep.* 575, "that if it be ascertained, in the progress of the trial, that the sum in contro-

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versy is not within the jurisdiction of the court, no judgment can be rendered, but the suit must be dismissed." The case there cited is very strong; the suit was debt—the demand exceeded \$105, but upon the trial it appeared that there was a credit on the note reducing the sum in controversy to less than \$90. The court dismissed the suit. In this case, although the damages are laid to \$200, still the damage on the whole breach was only \$9; and the entire value of the hogs, if they had been paid for by the plaintiff, would not have exceeded \$75; a less sum than would give the Circuit Court jurisdiction. The Circuit Court is of limited jurisdiction. The pleader should bring himself within that jurisdiction, and the pleading should show it; and because it does not, the motion in arrest should have been sustained.

GILCHRIST, *Contra*:

The court acted correctly in overruling the motion to exclude testimony respecting the value of pork at the time the hogs, in controversy, were to be delivered. It is one of the grounds upon which the plaintiff relies for recovery of damages in the action, and would be necessary to show he had sustained damages by a non-compliance on the part of the defendant.

5 The court acted correctly in refusing to grant a new trial:

First, because the defendant below shows no real or substantial reason for granting a new trial. A new trial will not be granted where the cause is litigated and damages small or inconsiderable. Nor upon the ground of newly discovered testimony unless the affidavits of the witness, whose testimony is discovered, or some other disinterested person, should accompany the application for a new trial. See *Cook's R.* 292; 3 *Hayw. R.* 104, 145; 4 *Johns.* 425.

Any exception to a juror must be made at the time of swearing. It comes too late after verdict, and forms no ground for a new trial. 5 *Hayw.* 30, 32; *Rev. Stat. Ark.* 635–6.

The court acted correctly in refusing to arrest the judgment:

1st. The plea of non-assumpsit admits the jurisdiction of the court, and sufficiency of plaintiff's declaration, and relies on the merits of the defence only.

The want of jurisdiction can be taken advantage of by plea in

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abatement only. 1 *Yerger* 489; 6 *ditto* 495; 1 *Tenn.* 476; 2 *Hayw.* 51-2.

DICKINSON, *Judge*, delivered the opinion of the court:

The question of jurisdiction having already been discussed and decided in the case of *Heilman vs. Martin*, and *James Hanna vs. Henry Harter*, we consider it unnecessary to make any further remarks upon the subject than to state, that from the pleadings, the court below rightfully took cognizance of the cause.

The defendant below excepted to the opinion of the court, and spread his exceptions on the record in admitting the testimony of one of the witnesses in relation to the price of pork, which is said to be inadmissible, and therefore, illegal. The declaration sets out a special contract, and this being the case, the plaintiff is required to prove his agreement as laid. That contract is, that he bought of the defendant ten hogs, to be delivered six weeks from the date of the agreement, at the defendant's dwelling-house; and upon the delivery thereof, he was to pay the plaintiff four dollars per hundred for the pork. The proof substantially supports this allegation, though it does it in a confused and somewhat imperfect manner. The evidence shews that the plaintiff first refused to take the hogs at the price agreed on, because he could not make up a drove of fifty or sixty head; that he afterwards called again and agreed to take them; to which the defendant consented. He then sent his agent to receive the hogs upon the day appointed, but the defendant refused to deliver them, upon the ground that the agent was not legally authorized to receive them. So far the proof may be considered as sustaining the declaration.

But the enquiry still remains to be determined, what is the correct standard or criterion in regard to the amount of damages that the plaintiff is entitled to recover by reason of the non-compliance of the defendant with the *conditions of his contract*? It certainly was the difference between the price agreed on between the parties, and the marketable price of the pork at the time of the delivery at the place fixed on by the agreement. And how should this difference be

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ascertained or computed? There is but one way by which it could be established. The plaintiff was bound to prove, by witnesses, what was the price of pork at the time for the delivery thereof at the place appointed; and the difference between that sum and the amount agreed to be paid by him, constituted the true damages that he was entitled to recover. This he failed to do, but proved, by a witness, that the defendant sold his pork at four dollars and fifty cents per hundred. Did the testimony, thus given, prove that was the marketable price of pork at that time and place, or in the neighborhood? Certainly not. The defendant might have sold his own pork at a greater or less sum than the ordinary selling price. But the fact of his so doing certainly does not establish the marketable price of the article. If this reasoning be correct the evidence objected was inadmissible, and therefore ought not to have been permitted to be given to the jury on the trial; and as this was all the testimony that was offered upon that point, the verdict must have been erroneous in fixing the amount of damages assessed. The judgment of the court below must, therefore, be reversed, and a new trial awarded.

WILLIAM CUMMINS *against* McLAIN AND BADGETT.

ERROR to Pulaski Circuit Court.

An attorney at law cannot be made liable as for money collected by him as attorney, unless it be proved either that he failed to prosecute the claims put in his hands for collection, with due and proper diligence, and that thereby the plaintiff lost the debt or claim; or that he has collected the money, and refused to pay it over on demand, or remit it according to instructions.

The attorney's liability depends upon the principle of his agency for the plaintiff, and he holds the money for him in the capacity of agent.

Before, therefore, he can be charged as being guilty of *laches* or culpable negligence, the plaintiff must demand payment, or request the money to be remitted, and the attorney must refuse to pay or remit.

Where an attorney sends a claim to another for collection, and the latter collects the money and refuses to pay it over to the plaintiff except upon the order of the former, the presumption is that the latter was the agent of the former; and this presumption amounts to full and satisfactory proof, unless it is rebutted or explained by competent testimony.

If the latter attorney, in such case, had collected the money, and refused to pay it over, the former would be liable, but not without demand on himself, and his own refusal to pay.

To sustain an indebitatus assumpsit count against an attorney, he must actually have received the money; unless from the special facts a legal presumption arises that he has received the money: and it is questionable whether even this exception prevails in case of an attorney.

This was an action of assumpsit, commenced in the court below by McLain and Badgett against Cummins. The declaration contained two counts. The first alleged a retainer of Cummins by McLain and Badgett, to collect a note due by G. G. McKinney, for three hundred and forty-three dollars and seventy-five cents, and a draft on the postmaster at Chicot for sixty-seven dollars and fifty cents, and a failure to collect. The second count was for \$700, money had and received.

Non-assumpsit was pleaded, and a verdict rendered, and judgment entered, for \$515 65 cents damages.

All the evidence in the case was set out in the bill of exceptions, and was as follows:

The plaintiffs first offered Cummins' receipt, in the following words: "Received, Little Rock, April 14th, 1836, of McLain and Badgett one note of hand on G. G. McKinney for three hundred and

forty-three dollars and seventy-five cents, for collection. Also, one draft on the postmaster at Chicot for \$67 50. Wm. Cummins." The defendant objected to the admission of the receipt in evidence—but his objection was overruled, and he excepted.

The plaintiff then proved, by a witness, that Cummins had admitted to him that he had sent or delivered the note of McKinney to Freeman, an attorney, or something to that effect, and that Freeman had collected the money and not paid it over, and treated him very badly.

The plaintiffs then read a letter from Cummins to Mr. Notrebe, dated Sept. 21, 1839, which stated that N. H. Badgett was the owner of a claim allowed against McKinney's estate, in favor of McLain and Badgett, and that he had his (Cummins') receipt therefor, which receipt gives a full description as to the amount, &c. That the note was originally given by G. G. McKinney to P. McKinney, and assigned to McLain and Badgett; the letter then requested Mr. Notrebe to take up his (Cummins') receipt and retain ten per cent. as the fees; and that Badgett would take Mississippi money.

The plaintiffs then proved, by a witness, that Freeman had told him that he had collected the money, and that he would pay it over upon the production of an order from Cummins, or his receipt, on reaching the mouth of the river; and they both went down in the same boat. The witness further stated that the note was due a year or more before the receipt was given; and that he presented the receipt to Freeman, who refused to pay the money. The defendant objected to the admission of Freeman's statements as evidence, which objection was overruled, and his statements permitted to go to the jury, to which the defendant excepted. He then moved the court to instruct the jury to find as in case of a non-suit; which motion the court overruled, and he excepted.

PIKE, for plaintiff in error :

It is plain, that upon the evidence, no verdict could be had on the first count, which charges a failure to collect the note of hand and draft, and to prosecute and conduct a suit therefor; because the evidence introduced by the plaintiffs shows that suit was instituted, and

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the claim allowed, and the money received by Freeman. The plaintiff therefore could only recover upon their second count, for money had and received.

The overruling of the motion for instructions to find as in case of a nonsuit, brings up the whole evidence for review here, and raises the question directly, whether the evidence, or so much of it as was properly admitted was sufficient to warrant the finding of the jury on the second count.

But before we examine this matter, a preliminary question suggests itself, and that is, whether the court erred in permitting Badgett, the witness, to testify as to statements made to him by Freeman. The rule that hearsay shall not be made evidence, lies so deeply at the foundations of the law, that it needs no quotation of authorities to enforce it—and nothing is perceived which can take these statements out of the general rule.

The statements of Freeman must have been admitted upon some vague notion that the admissions of an agent are always evidence against the principal: for there is no other possible ground on which they could have been received. But the rule upon the subject, even admitting Freeman to have been the agent of Cummins, does not warrant the introduction of the statements made by him, and which were admitted in evidence.

It is true, that if the agent, at the time of making a contract for his principal, makes any representation, declaration, or admission, touching the matter of the contract, it is the representation, declaration, or admission of the principal; and as such, admissible against the principal. *Story on Agency*, 126. But in this case, no contract was ever made by Freeman, as the agent of Cummins, with the plaintiff below; and his statements were made long subsequent to his receipt of the note from Cummins. And the representation, declaration or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but on another occasion. See *Story on Agency*, 126, and cases there cited. And as Sir WILLIAM GRANT said, in *Fairlie vs. Hastings*, 10 Ves. 126, "what one man says, not upon oath, cannot be evidence against another man." And with regard to agents, the exceptions are, that "what the agent has said may be

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what constitutes the agreement of the principal; or the representations or statements made, may be the foundation of, or the inducement to, the agreement. So with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways," he says, "I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent." And he concludes that "it is impossible to say that a man is precluded from questioning or contradicting any thing which any person has asserted as to him, as to his conduct or agreement, because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. And see the opinion of KENNEDY, J. in *Hannay vs. Stewart*, 6 *Watts*, 489, quoted in *Story on Agency*, 128.

The principle will be found well settled that the statements of an agent generally, though made of the business of his principal, are not to be taken as equivalent to the admissions of the principal; and they come under the general rule of hearsay, unless made by him at the very time of entering into the agreement, or of transacting the business, under the authority of the principal.

Laying out of question then, the statements of Freeman, the testimony is that Cummins, on the 14th of April, A. D. 1836, received the note on McKinney from McLain and Badgett, for collection, and sent it or delivered it to another attorney for collection: that Cummins, by letter, stated the claim to have been allowed, and admitted to Col. Fowler that Freeman had collected it, and had not paid it over.

The writ was issued January 19, 1839, and it does not appear that any portion of the money was at that time collected; and there is no proof whatever as to the draft, except Cummins' receipt. The only proof of the collection of the money is contained in the admissions Cummins made to Col. Fowler. It does not appear when those admissions were made, or at what time the money was collected; and

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as the bill of exceptions specially sets out *all* the testimony in the case, the court cannot presume either that the money was collected, or the admissions made previous to the commencement of the suit. The letter of Mr. Cummins, of what date we know not, unless it was Sept. 24, 1839, only shows that the claim was allowed, and directs it to be paid over to Mr. Badgett.

But laying this out of view, and admitting that it could now be presumed that the money was collected by Freeman before the suit was commenced, we contend that there is no proof that Cummins received the money either by himself or his agent: and if not, of course there could be no recovery on the second count.

What was the scope of Freeman's agency? The note was sent or delivered to him by Cummins, to be allowed against an estate. Is there any proof whatever that Freeman was authorized by Cummins to receive the money? Not the slightest. On the contrary, the letter of Cummins, introduced by the defendants, repels any such presumption and shows that Cummins directed a third person to pay it over. That third person, it appears, could not do so, because Freeman had received it. If then Freeman was not authorized by Cummins to receive the money when collected, the receipt of it by him was not a receipt by Cummins. There is no proof that he was generally employed by Cummins to obtain allowances and receive the amount of them when paid; and therefore no presumption that he was authorized to receive the money can arise in that way. There is no proof that he was specially authorized by him in this particular instance to receive it, or that he had received money under like circumstances in other instances: and assuredly it was not *incidental* to his employment for the purpose of obtaining the allowance, that he should also have authority to receive the money. Where a claim is received by an attorney on which to bring suit, from the owner of the claim, the power and authority to receive the money is also implied—but no such authority can be implied from the transmission of a claim from one attorney to another for the purpose of having the claim allowed in the Probate Court. That one attorney is employed by another to attend to the progress of a case does not show also that he was authorized to receive the proceeds of the judgment.

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At all events, upon the ground of error in the admission of Freeman's statements the judgment must be reversed.

FOWLER, Contra:

The first error assigned is that the court below refused to exclude from the jury Cummins' receipt for the collection of the said note on McKinney and the draft on the said Post Master. Upon what principle of law this supposed error is predicated the counsel for McLain and Badgett, are at a loss to perceive, and therefore advance no argument against it. The receipt was admissible under either count; in the first to show the undertaking as an attorney, and in the second as conducing to prove that he did receive the money for the use of McLain and Badgett. The second assignment, as to the statements of Freeman is equally untenable. The proof shows that Cummins had constituted Freeman his sub-agent to collect the money. He then certainly became responsible for Freeman's acts in relation to its collection; and Freeman's statements that he had collected the money and would pay it over are certainly competent testimony against Cummins on the fact of such sub-agency being established. 4 *Wend.* 394; 7 *Wend.* 446; 11 *Wend.* 87; 6 *Cowen*, 354; 8 *Cowen*, 193; 15 *Johns. Rep.* 44; 16 *Johns. Rep.* 86.

The receipt, the letter, the verbal acknowledgments of Cummins, the admissions of Freeman, all taken together—or the receipt, the letter, or admissions of Cummins *separately*—establish a case which fully warrant the verdict: the jury could have found no other. The court could not have given the instruction asked for to the jury without violating the first principles of law; and usurping their province by deciding facts, which belongs to the jury exclusively.

Cummins, in the court below, waived all former exceptions taken by him to the evidence, even supposing such objections valid, by his motion for instructions as in case of non suit, upon which he *ipso facto* rested his case. And this motion being made upon a supposed defect in the evidence of the adverse party, the court was not only bound to take the evidence as true, but also to infer from it every fact which the jury might rationally and fairly infer. And upon this position could the court fairly draw any other inference than that Cummins

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was responsible to the plaintiff—that a case was made out—and refuse to give instructions contrary to the weight of the evidence? 1 *Bibb's Rep.* 209, *Gallatin vs. Bradford*.

Where evidence of debt is left with an attorney, who gives a general receipt therefor, it will be presumed that he received it for collection; and if an action be brought against him for negligence in its collection, it is incumbent on him to show that he received it *specialy*, and for some other purpose. 3 *Johns. Rep.* 185, *Executor of Smedes vs. Elmendorff*.

Frecman, after the allowance or judgment, had authority to receive the money. 10 *Johns. Rep.* 220; 6 *Johns. Rep.* 51.

CUMMINS, in response:

By the rules of law—rules inflexible, and to which there are no exceptions—the plaintiff must prove his allegations, and then he is entitled to a recovery. He cannot prove things different from his allegations. If his proof varies the least, in substance, from his alleged grounds of action, he must lose his suit. Immaterial variations, it is true, are not regarded; but where the variations reach the substance, the material body of his charge, it is fatal.

Let us apply this rule, alike founded in common sense and common justice, to the present case. The record, before the court, shows the whole evidence adduced in the case, certified by the Judge below, and that upon this evidence, a motion for judgment of nonsuit was submitted to the court, and overruled.

Does this evidence, thus certified, support the first grounds of action alleged? It does not. The evidence discloses and proves that McKinney was dead, and proceedings, were, by law, to be had in the County or Probate Court, to have the claim allowed against the estate. The evidence also shows that the claim was allowed, and that all was done which, under the law, could be done by the common attorney. By the administration laws of the State, in force since the beginning of this transaction, claims against deceased persons' estates could only be collected by presenting the claims and having them allowed, and then at designated times. The executor or administrator of such estate, under the order and direction of the Court of Probate, could

provide means of payment of claims allowed. This is the well known, and legal course. The time of the payment of such claims, thus allowed, depended on the discretion of the Probate Court, as applied to the peculiar character of the estate left by the deceased. The time of payment was by no means certain or fixed by law. This evidence, then adduced by the plaintiffs themselves, for the defendant offered none, proves just the reverse of the allegations upon which the claim is first grounded: the neglect of duty, and the want of due diligence as an attorney. It shows, conclusively, that all was done within the legal power of an attorney. The allowance was made against McKinney's estate. More he could not do. He could not fix the time of payment, for the plain reason that he had nothing to do with the discretion of the Judge of Probate, who had the entire power to order payment, and order the collection of funds of the estate to meet and discharge its liabilities. The evidence then, thus far, clearly defeats the action. No neglect is shown; and on this the plaintiffs rely in the first count of their declaration. They allege no neglect as the grounds of action. They, to be able to recover, must, of course, prove that neglect; upon which they allege their right depends. The receipt of the defendant for the claims proves that he had them; nothing more. That he had them for legal action and collection, according to law. That he was bound to do all that the law placed in his power, reasonably to do; but does not prove that he was to do what the law had placed in the discretion of the Probate Judge. The time of payment was left by law with that tribunal, consequently the attorney cannot be held responsible for his discretion. The receipt of Cummins proves no neglect. The neglect is the material allegation in the first count; and to enable the plaintiff to recover on this count, he must prove directly what he alleges. Hence the position taken for the defendant is undoubtedly correct. The receipt, to enable the plaintiffs to raise the grounds of a recovery thereon should have been made the grounds of the action, as a special assumpsit, or covenant, as it was, but it did not prove neglect to do what it contained the promise of doing. A man's written obligation to build a house or do any other particular or special thing is surely not proof of his neglecting to do it. How

then is the undertaking of an attorney to do a piece of business, reduced to writing, proof that he did not do it? Surely argument cannot be necessary to confute so palpably false a position. The rules of law never do presume a man has broken his contract. They invariably require proof before damages are awarded for a breach. Then the evidence adduced directly destroys the grounds of action in the first count. The pretence that the length of time from the giving of the receipt to the bringing of the suit was sufficient legal presumption of liability against the defendant is too palpably erroneous to merit a reply. The time of paying the claim, when allowed, depended on the discretion of the Probate Judge. The time of bringing the suit, and its termination too, depended on the caprice of the plaintiffs, if you please, and to argue against an attorney's liability on either of these grounds, and these are all, would be mockery. The evidence, therefore, in no respect, sustains the count for neglect and the recovery cannot be supported in that respect.

The remaining inquiry is, does the evidence support the second grounds of the action alleged, "money had and received to the use of the plaintiffs?"

There is no proof offered that the defendant received the money. No attempt is made to establish that fact. The proof of a receipt was surely indispensable, as this was the allegation. Proof that Cummins requested Freeman to get the allowance before the court is surely not proof that he authorized him to receive the money. No proof whatever is offered to show that Cummins either sanctioned or in any way authorized the receipt of the money by Freeman. Surely Cummins' duty was faithfully performed in having the allowance made, which Cummins got Freeman to do for him. Authorizing him to get the allowance was not authorizing the taking of the money. The receipt by Freeman was no receipt by Cummins, unless it was expressly proven that Cummins gave the authority. So far as he acted as agent for Cummins, the business was done. Had this been negligently or unfaithfully done, and the note had been lost, or the claim not presented, defendant would have been responsible for this, but not on the count for money had and received. Defendant had no other duty to perform but to get the allowance. The plaintiffs, however

adduced proof, so far as it amounts to evidence at all, tending to show that defendant did not authorize Freeman to receive the money. His order, (not on Freeman, but on the administrator of the estate, in favor McLain and Badgett) shows, conclusively, that he did not intend, and never had intended to authorize Freeman to get the money. This letter or order shows, really, the whole truth of the transaction. Defendant assumed no control over the money, and really had not, perhaps, a legal power to control it. The order given was intended to describe the claim, to enable the administrator to pay the proper amount to the persons entitled; and was not an assumption of the power to control the money. Can a defendant, from the above facts, be held bound on the count for money had and received? Surely not; for he neither received it nor empowered another to receive it. Defendant is no more liable than any other man in the community. Can an attorney be liable for money improperly taken in hand by an irresponsible person? Suppose a man, without authority, by false pretences, fraud or force, obtains money from a sheriff after the money is collected—an administrator or any other person—is the attorney, employed for the collection of this money, responsible for the crime or misconduct of the person so taking it? Undoubtedly not. Is it not the universal law that all persons owing money must take care to whom they pay, and see that their discharge is legal and from a proper source? And in the other case of taking by violence, no person is chargeable but he who commits the violence. In the case of the debtor paying to an unauthorized individual he himself is responsible for his own indiscretion, and must pay the money over again, and cannot charge his creditor with it. Now this money, so far as the facts are shown, and the truth of the matter is, was fraudulently obtained, and without any authority whatever. Can defendant be held responsible for this fraud, in which he had no concern, and a different rule of law to be dealt to him from that which applies to all others? This, the defendant is well assured, will not be the case. The plaintiffs chose to rest their chance of recovery on the presumptions they hoped to raise on the receipt and other circumstances, rather than to attempt proving a direct legal liability. This they knew they could not do; and preferred the chances resulting from

intendments, and the known inclination of jurors to find against an attorney.

The testimony given by Col. Fowler, which I have no doubt is defectively stated on the record, yet being there, its indefinite character must be remarked. A conversation is given with defendant touching the transaction. It is said to be something like the conversation with defendant—some expression of this sort—stating a mere resemblance, is used, but what kind of resemblance, or how far like or unlike, is not stated. This, of course, cannot amount to any thing.

Another point, disclosing palpable error, is that the statements of Freeman were hearsay, now received to charge defendant in this case. It has been said, in argument, they were immaterial indeed! Why were they then pressed before the jury against the objections of defendant? The court below decided that they were good evidence to the jury, by admitting them, and the jury were bound to consider them as material. The court (admitting the argument now) must have erred in this decision; and whether the jury founded their verdict on the evidence or not cannot be determined. It may, as the court below favored and admitted the testimony, have been the principal evidence in producing the verdict. The rule is inflexible that it is error to admit to a jury illegal evidence for the reason above stated, and renders the grounds, on which the verdict rests, uncertain. The admission of this grossly illegal evidence throws a dark shade over every act of the court below in rendering this judgment. Waiving the effect of the shades of the case, the defendant relies on the substantial legal errors for a reversal of this judgment.

DICKINSON, *Judge*, delivered the opinion of the court:

An attorney at law cannot be held liable as for money had and collected by him, as such attorney, unless it be first proved that he either failed to prosecute the claims put into his hands for collection with due and proper diligence, and that thereby the plaintiff lost his debt or claim; or that he had collected the money, and refused to pay over on demand, or to remit it according to instructions. The attorney's liability rests upon the principle of his agency for the plaintiff, and he holds the money for his principal in that capacity. The

plaintiff must then demand payment or request the money to be remitted, and there must be a refusal to pay or remit before the attorney can be charged as being guilty of laches or culpable negligence. It would be in opposition to the nature of the trust created between the parties, as well as against good faith and justice, to hold the attorney liable before demand and refusal to pay or remit the money. This principle is unquestionably settled by all the authorities. *Taylor vs. Bates*, 5 Cowen, 376; *Rathbone vs. Ingalls*, 7 Wend. 320; *Ferris vs. Paris*, 10 J. R. 285. The application of the rule just cited will test the question now before the court. The proof wholly fails to show that the plaintiff ever made any demand for the money of the defendant, or that he refused to pay it over according to their instructions. The proof then fails to sustain the first count in the declaration, which charges the attorney with culpable negligence. It is not shown that the money ever came to the hands of Cummins, or that he has collected it, unless his sending the claim of McKinney to Freeman to collect, and he, Freeman, receiving the money, can be regarded as a collection by Cummins, upon the ground that he had constituted Freeman his agent in the business. The evidence unquestionably shows that Cummins sent the claim to Freeman for collection, and that the claim was allowed, and that Freeman had collected and refused to pay it over to the plaintiffs. There is no evidence that the draft upon the Post Master of Chicot, was either accepted or paid, or that he was able to pay it. These facts certainly raise a strong presumption that Freeman was Cummins' agent, which would amount to full and satisfactory proof, unless rebutted or explained away by other competent testimony. If Freeman collected the money, and refused to pay it over, Cummins would be answerable for such default or negligence upon his original implied undertaking. But then to charge him on account of such liability, as an attorney at law, a demand and refusal must be proved on the trial. The demand must be made of Cummins and not of Freeman, and a refusal on his (Cummins') part to pay over must appear before the action can be sustained. For the law presumes he will pay over the money collected by him as attorney, until the contrary is affirmatively and satisfactorily shown. If Freeman collected the money as Cummins' agent, it was but the act of

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Cummins himself; and therefore was collected in the character and capacity of an attorney, and of course Cummins cannot be held liable without proving demand and refusal on his part to pay it over.

The proof certainly does not sustain the only remaining count in the declaration, which is *indebitatus* assumpsit. It is a general rule that to sustain such count, the defendant must actually have received the money. The receipt, however will, under peculiar circumstances be presumed. 1 *Chitty's Pleadings* 341; and cases there cited; *Israel vs. Douglas*, 1 *H. Blackstone*, 239. But such presumption arises from the special facts of the case, which carry a legal inference that the money has actually passed into the hands of the defendant, or been received by him. In the present case, no such inference can arise, because the attorney's liability only accrues, upon demand and refusal before the institution of the suit. His contract was to collect the money as an attorney, and he can only be charged in that capacity by proving culpable negligence. It is then very questionable whether an attorney can be made liable upon an *indebitatus* count, unless the plaintiff first shows that the money actually came into his possession. Be that however as it may, it is certainly clear that he is not liable unless it be first demanded of him, and he refuses to pay it over. The law presumes that the attorney, like every other officer, will do his duty, until the contrary affirmatively appears. And the presumption is fortified and strengthened by the confidence the plaintiffs have reposed in his integrity and capacity.

It necessarily follows, from the principles thus established, that the court below erred in refusing to instruct the jury as in case of non suit. The bill of exceptions contains all the evidence that was introduced upon the trial, and that wholly fails to show that the plaintiffs made a demand of the defendant before the institution of this suit, or that he refused to pay over any moneys which he may have collected as an attorney.

The judgment of the Circuit Court must therefore be reversed.

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ERROR to Hempstead Circuit Court.

Papers copied into the transcript, purporting to be instructions asked for, and given or refused, marked on the margin with the word "given," or "refused," opposite each instruction, are no part of the record.

And where a party moves for a new trial because the verdict was contrary to law; and because, second, certain instructions were refused; but does not except to the opinion of the court overruling his motion for a new trial, he is equally as far from making the instructions a part of the record.

The fact that no exceptions were filed, proves that the court was right in refusing the motion for a new trial, or that the party waived his motion.

In action on the case, a recovery, release or satisfaction need not be pleaded, but may be given in evidence under the general issue. Whatever will in equity and conscience preclude the plaintiff's right of recovery, may be given in evidence.

Where a writ of attachment is made a part of the record, and recites the affidavit on which it issued, such recital does not make the affidavit a part of the record, though separately copied into it.

Where, in case for negligence, one count in the declaration recites a writ of attachment, by virtue of which, it is alleged, certain property was seized, and afterwards lost by negligence of the sheriff and plaintiffs in attachment, the defendants have a right to read the original writ in evidence to the jury.

An unlawful levy upon property, as under a void writ of attachment, is such a tortious taking and conversion as will support trover.

Under the Organic Law of the Territory, the Legislature of the Territory had ample power to give a justice of the peace authority to issue writs of attachment returnable to the Circuit Court, whether this was a judicial or ministerial act: for they could give him power to do either one or the other act.

The writ of attachment, issued by a justice and returnable to the Circuit Court, lay, under the Territorial Law, as well against non-resident as resident debtors, or persons endeavoring to remove themselves or effects beyond the Territory: and upon unliquidated, as well as liquidated demands.

The statute was remedial in its nature, and therefore to be construed liberally, to prevent the mischief for which it was enacted.

The idea that the creditor and debtor must both have been residents of the Territory is wholly untenable.

If the writ, under that statute, was issued upon an affidavit following the form prescribed by the statute, it was valid.

ABSENT, RINGO, *Chief Justice.*

This was an action of trespass on the case instituted in Lafayette Circuit Court, by the plaintiffs in error, against the defendants in error, together with Burkett D. Jett.

The first count was a count in trover, alleging the loss by the plaintiffs, and the finding and conversion by the defendants of sundry articles therein specified.

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The second count specially stated that the defendants in error, on the first day of June, A. D. 1833, at Lafayette county filed with one Massach H. Janes, a justice of the peace, the affidavit of said Buzzard, stating that the plaintiff, Roberts, was indebted to the defendants in error in the sum of one thousand dollars, or thereabouts, for and on account of damages sustained by them by the failure of said Roberts to perform his agreement to tow a certain keel-boat up Red river, and deliver certain loads of corn at certain places, all therein particularly specified; and stating further that he, said Buzzard, had good cause to believe that said Roberts was not a resident of, or residing in the Territory of Arkansas, so that the ordinary process of law could not be served on him, and that said Buzzard and Herndon were thereby in danger of losing their said debt. The count then stated that upon this affidavit a writ of attachment was issued by said justice, against said Roberts, returnable to the next term of Lafayette Circuit Court, which came to the hands of said Jett as sheriff, to be executed; and, upon that, said Jett, on the 3d day of June, A. D. 1833, before the return day of the writ, at Lafayette county, at the special instance, and by the express direction of said Buzzard and Herndon, levied the said writ on a certain steamboat, Bolivar, then navigating Red river, the property of the plaintiffs in error, with her tackle, engine and furniture: that said defendants did not take proper care of said boat, &c., and by their negligence she was lost.

The third count was an anomalous one, stating that the plaintiffs were owners of said steamboat, and that the defendants *possessed themselves of her*, to plaintiffs' great damage.

On the declaration, and an affidavit annexed, a *capias* issued, which was executed on all the defendants, who severally gave bond for their appearance.

At the return term Buzzard and Herndon pleaded not guilty, and Jett also filed his separate plea of not guilty, and leave was given to each party to file special pleas of justification.

The case was then, on application of the plaintiffs, transferred to Hempstead county.

At April term, 1839, Buzzard and Herndon, having severed in their

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pleading from Jett, the case came on for trial as to them, and a verdict was rendered in their favor.

On the trial the defendants offered to read, in evidence to the jury, the original writ of attachment, recited in the second count of the declaration, which was objected to by the plaintiffs, but permitted by the court, and the plaintiffs excepted, and by their bill of exceptions made the writ of attachment, in which was recited the affidavit on which it issued a part of the record.

The clerk copied into, and sent up as a part of the transcript, what purported to be a separate copy of this affidavit, as also the sheriff's return on the writ. There were also copied in the transcript two motions, one of the plaintiffs, and one of the defendants, each for several instructions; and on the margin of each motion, opposite each instruction was written the word "given," or "refused." None of the instructions moved for were made part of the record by bill of exceptions or otherwise.

After the verdict, the plaintiffs moved for a new trial, on two grounds; First, that the verdict was contrary to law: Second, that the court erred in refusing the first and second instructions asked by the plaintiffs' counsel, and in giving the instructions asked by defendants' counsel; which motion was overruled.

TRIMBLE, for plaintiff in error:

The plaintiffs in error rely on the following grounds to reverse the judgment of the Circuit Court, in this case. First, the Circuit Court ought not to have allowed the said writ of attachment to be read as evidence to the jury. Second, the said court erred in instructing the jury that said writ of attachment was a justification to the defendants in taking and detaining the said boat, &c. &c.

The following objections to the writ of attachment will be found available. First, the Justice of the Peace had no jurisdiction of the subject matter of the attachment, of the person of the defendant, (David Roberts,) he being a non resident, nor of the place. Second, the said attachment is void, being contrary to law, and not in conformity to the act which authorizes a Justice to issue an attachment. It is void for uncertainty. The objection is that the Justice of the

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Peace had no jurisdiction or power to issue the attachment offered in evidence. The power of a Justice of the Peace to issue an attachment for a sum over fifty dollars, and returnable to the Circuit Court, can only be derived from the 29th section of the law. See *Steele and McCampbell's Digest, title Attachment, p. 88*, "In all cases where any person has any debt or demand against any other person in this Territory, and he shall have good cause to believe that said debtor has removed, or is about to remove, himself or effects out of this Territory, is shall be lawful for such creditor, in all cases when the demand shall exceed the sum of fifty dollars, to apply to some Justice of the Peace of the county where such debtor resides, and to file his affidavit in writing, stating that the person (naming him) is indebted to him in a sum exceeding fifty dollars, and that he has good cause to believe that the said defendant is not a resident of, or residing, in this Territory, or that he is about to remove himself and effects without this Territory, (as the case may be,) so that the ordinary process of law cannot be served on him, and the said plaintiff is thereby in danger of losing his said debt: whereupon, it shall be the duty of said Justice to issue a writ of attachment, returnable to the next Circuit Court of the county in which he resides, commanding," &c. In this case the attachment recites the affidavit as a ground for issuing the writ. The recitation is as follows: "Whereas Jacob Buzzard has this day before me, a Justice of the Peace in and for the county aforesaid, personally appeared and subscribed and filed his affidavit, stating that David Roberts is indebted to him and one Fleetwood Herndon jointly, in a sum exceeding fifty dollars, that is to say in the sum of one thousand dollars or thereabouts, and that he has good cause to believe that the said defendant, David Roberts, is not a resident of or residing in the Territory of Arkansas, so that the ordinary process of law cannot be served upon him, and that the said Buzzard and said Herndon, plaintiffs, are thereby in danger of losing their said debt," &c. In order to decide this question of jurisdiction, it will be necessary to analyze the 29th section, referred to, also the recitation in the writ, (which is a part thereof, which lays the foundation of the magistrate's proceeding which gives jurisdiction, if he has any,) and subject both to recognized tests of construction, and apply to them those principles

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which govern other judicial tribunals in determining like questions. Every human jurisdiction rests on one of these foundations, or on several of them together: First, the place or territory over which it is exercised, and that is called jurisdiction over the place, *in locum*: Second, The persons which are subject to its action, and that is jurisdiction over the person, *in personam*: Third, the subjects of which it takes cognizance, and that is jurisdiction over the subject matter, *in materiam*. This last species of jurisdiction is sometimes limited by persons or places, by being restricted to cases in which certain persons are concerned, or to matters which arise or happen in certain localities. Thus the Constitution of the United States gives jurisdiction to the Federal Courts of all suits between aliens and citizens of different States. This jurisdiction is general as respects the subject of litigation; but is limited by the relative character of the litigant parties. It may therefore be considered as within the class of jurisdictional power over the subject matter, vesting only with respect to certain persons, *ratione personarum*. In like manner the court of admiralty has cognizance of all things done on the high seas. This jurisdiction is also founded on the subject matter: it is not complete, however, until made so by the concurrent circumstances of locality; it is therefore *jurisdictio in materiam ratione loci rei actae*. *Duponceau*, 21, 22.

For example, a citizen of Kentucky brings a suit in the Federal court against a citizen of Arkansas, the declaration must show that the plaintiff is a citizen of Kentucky, and that the defendant is a citizen of Arkansas, before the jurisdiction of the Federal Court will attach so as to be exercised over the subject matter.

Thus, in the case before the court, it should appear from the affidavit that the debt or demand is held by some person against some other person in the Territory, and it must further appear on the papers, that the Justice of the Peace who issues the attachment is a resident of the same county with the debtor. By the affidavit in this case, it appears affirmatively that David Roberts was at the time of issuing the writ in this case not a resident of or residing in the Territory, consequently could not be a resident of Lafayette county. By the said 29th section, the jurisdiction only attaches under particular

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circumstances, and then only to the Justice of the county where the debtor resides. The affidavit must be filed in writing, and it is necessary that all the various facts which are stated in the 29th section, and which constitute the whole of that special case, which will authorize the issuing an attachment, must exist and concur to give the jurisdiction: they are all conditions precedent to the exercise of the power by the magistrate, and must be stated in the written affidavit, and if one be omitted, the whole of the foundation of the Justice's power is as much broken as if all had failed. Which one of those several facts may be omitted in the affidavit? If any, why not omit all, and rest entirely on the presumption that as the magistrate exercised the power, that therefore he had the power, the jurisdiction.

Two distinct questions are involved in this section: First, it is to be looked to as a source of jurisdiction; and second, as a rule or means of its exercise. See *Du Pousseau on jurisdiction*, p. 6. It is of the first importance, in this investigation, that these two questions should be kept separate, so as to avoid the error of deriving a jurisdiction from that part of the section which only prescribes the rule by which the jurisdiction is to be exercised, and at the same time we should be particularly careful not to derive the jurisdiction of the officer or court from that part of the section which describes the extraordinary case which alone will justify the issuing of an attachment. The first part of the 29th section describes the extraordinary case. It then points out the officer who shall have power or jurisdiction to issue the attachment, to wit: "some Justice of the Peace of the county where such debtor resides." This part of the section is the one and the only part which describes the officer or court who has power or jurisdiction to issue the attachment, and afford the inceptive remedy for that extraordinary case described in the first part of the section. Whoever, then, exercises this jurisdiction, must fill the description, and be indetical with the person described in that part of the section, i. e. some Justice of the Peace of the county where the debtor resides.

This question of jurisdiction is precedent to and paramount the question by what rule the jurisdiction shall be exercised, that is, by what rule the remedy shall be applied after (and not until after) the jurisdiction is conceded. When the question of jurisdiction is con-

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ceded, it may then become a matter of enquiry how or by what rule it shall be exercised. That portion of the section which prescribes what shall be done by the plaintiff cannot, and ought not, to be referred to as a source of jurisdiction, (to illustrate.) This court derives its jurisdiction from one source, to wit: the constitution. The mode of exercising that jurisdiction is derived from a different source—the statutes. Here the distinction between the questions is obvious.

By the 29th section, referred to, the extraordinary case is described—the jurisdiction given, and the mode of its exercise. The questions are no less distinct in reference to the Justice of the Peace than in reference to the court: in either case, no inquiry is made as to the mode of proceeding until the question of jurisdiction is settled; and it would be equally absurd to look to that part of the 29th section which prescribes the rule of proceeding for the jurisdiction of the justice, as to look to the law prescribing the mode of proceeding in the Supreme Court as a source of jurisdiction.

So with regard to other courts—their jurisdiction and mode of proceeding. If the above reasoning be correct, (and that it is, I have much confidence,) two consequences must follow: First, that the question by what rule it shall be exercised; and second, if there be any inconsistency between that part of the 29th section, which prescribes the mode of proceeding, and that part which confers jurisdiction, then the clause conferring jurisdiction must govern, and so much of the other part of the section as is inconsistent with it, must be inoperative.

Suppose the necessary precedent facts to exist: the section referred to says, “it shall be lawful for such creditor, in all cases where the demand shall exceed the sum of fifty dollars, to apply to some Justice of the Peace of the county where such debtor resides.” What Justice of the Peace has jurisdiction? Surely none other than one who fills the above description; i. e. some Justice of the Peace of the county where such debtor resides; and this is consistent with the first part of the section which says, “in all cases where any person has any debt or demand against any other person residing in this Territory;” both evidencing that the debtor must be a resident of the Territory, and of some county. If he (the debtor) be a non-resident of the Territory, he is not subject to an attachment. If he is not a resi-

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dent of some county, no Justice of the Peace has jurisdiction. Here the jurisdiction over the subject matter is wholly governed by the place and person of the debtor, and by either the place or person. Thus the Federal Court of Arkansas has jurisdiction over subjects in matters of debt; but this only attaches, and is wholly governed by the locality of the debtor in Arkansas; so with the additional fact that the plaintiff is a resident of some State; and these facts must appear on the record.

But perhaps it may be said that the affidavit in this case pursues the statute strictly: for the argument sake, be it so. We have above endeavored to show that it is only resident debtors that are subject to this process of attachment; and also that the debtor must be a resident of the same county with the Justice of the Peace, before the jurisdiction can attach and be exercised by the Justice. We have also endeavored to show that the question of jurisdiction is precedent, and must overreach the question as to the mode of proceeding; and, further, that if there be any inconsistency between these two parts of the section, then the latter must yield to the former.

The first part of the section says, "in all cases where any person has any debt or demand against any other person in this Territory." The part of the affidavit which speaks of the locality of the debtor, says, "and that he has good cause to believe that the said defendant, David Roberts, is not a resident of, or residing in the Territory of Arkansas, so that the ordinary process of the law cannot be served upon him," &c.

These are inconsistent.

That part of the section which describes the conduct on the part of the debtor, which will subject him to this process, says, "that said debtor has removed or is about to remove himself or effects out of this Territory," &c. The affidavit says "that said defendant, David Roberts, is not a resident of, or residing in the Territory of Arkansas."

This affidavit is not an equivalent for either of the statements opposite.

It is not equivalent to the statement that said debtor has removed out of the Territory; for this implies that he was once in the Terri-

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tory; that leaves no implication of the kind. This is consistent with the first part of the section; that is not. Again,

The section says, "it shall be lawful for such creditor, in all cases where the demand shall exceed the sum of fifty dollars, to apply to some Justice of the Peace of the county where such debtor resides." This gives power or jurisdiction to some Justice of the Peace of the county where such debtor resides, &c. The affidavit states "that said defendant, David Roberts, is not a resident of, or residing in the Territory of Arkansas."

The affidavit says the debtor is not a resident of the State, consequently could not be a resident of Lafayette county; wherefore, no Justice of the Peace of Lafayette county could issue the attachment; that is, no Justice of Lafayette had jurisdiction in the case, either of the person or subject matter, the defendant not being located in his county. If a local action is brought in a wrong county, this may be pleaded in abatement of the plaintiff's writ, as well as to the jurisdiction, and if it appear on the record, the defendant may demur, or the plaintiff may be nonsuited. *Story's Pleading* 25, where 1 *Wils.* 165, 1 *Comp.* 409, is referred to. This proceeding is local by the statute, i. e., by the 29th section it is local to the county where the defendant resides; local in respect to the residence of the defendant; and local in respect to the jurisdiction of the Justice. Actions may be local in reference to the subject matter of the suit, as in real actions or ejectments. They may be local in reference to the person of the plaintiff or defendant. The first are so by the common law; the latter by our statute.

The argument, so far, has been on the ground that the affidavit strictly pursued the statute. Now whatever of inconsistency has been exposed in the above argument, it will be for the defendants here to reconcile; and being themselves within all the provisions of the 29th section, at least within that which confers jurisdiction; and they must also show that the debtor was such a resident of the Territory as would subject him to this process. If, in their anxiety in the affidavit to follow the words of the statute, they have left the substance to grasp at the shadow, this court will not allow them to make that

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shadow a justification for the injury which they have committed on the property of the plaintiffs.

But I will now endeavor to show that there is little or no inconsistency in the 29th section, and that all the inconsistency is in the affidavit.

That part of the 29th section which speaks of the affidavit to be made by the creditor is as follows, viz: "And to file his affidavit in writing, stating that the person (naming him) is indebted to him in a sum exceeding fifty dollars, and that he has good cause to believe that the said defendant is not a resident of or residing in this Territory, (as the case may be,) so that the ordinary process," &c. &c. Now this part of the section was only intended as a form to direct the creditor, and the words not a resident or residing in this Territory, and the words about to remove himself and effects, were intended as examples to illustrate the intention of the Legislature, for the words (as the case may be) commands that the affidavit should be so made as to conform to the true state of the case, and to comply with the previous requisitions of this section; by adopting this construction, this section is relieved of all apparent incongruity, and a sensible effect is given to all parts of the section.

But to depart from this construction of that part of the 29th section which describes the extraordinary case that will authorize this proceeding, to wit: "In all cases where any person has any debt or demand against any other person in this Territory, and he shall have good cause to believe that said debtor has removed or is about to remove himself or effects out of this Territory," and adopt a different one, and perhaps the true construction, to wit: that there are but two acts of the debtor that will justify the issuing of an attachment, viz: First, that he has removed himself or effects. Second, that he is about to remove himself or effects out of this Territory, &c. Now the affidavit in this case will not satisfy either of the above cases. The affidavit which states that David Roberts is not a resident of or residing in the Territory of Arkansas, so that, &c., is not equivalent to the case of the debtor having removed himself or effects. Nor is it equivalent to the case of the debtor being about to remove himself or effects out of the Territory. The counsel for the plaintiffs must again insist that the specification in that part of the 29th section which refers to the

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form of the affidavit was there inserted by way of example, and not to be adopted in all cases, but that the affidavit should be so varied as the case requires, and to show a state of the case as is described in the first part of the said section. The counsel would here refer to a preceding part of this argument and to the authority: *ex parte Schroeder*, 6 Cow. 603; 1 Wend. 44; 2 Kent Com. 402, where it is laid down that an attachment cannot issue against a debtor who resides out of the Territory.

Another construction may be given to the first part of the 29th section; *i. e.*, that this part of the section provides for four cases: First, where the debtor has removed himself out of the Territory: Second, where he has removed his effects out of the Territory: Third, where he is about to remove himself out of the Territory: Fourth, when he is about to remove his effects out of the Territory.

This construction will not help the defendants, for the affidavit is equally inapplicable to either of these cases. It cannot be pretended that it will apply to either of the three last cases, and it will not apply or satisfy the first because that case is a case of removal, and implies that the debtor was once a resident of the Territory, whereas, the affidavit states him to be not a resident of the Territory, and leaves no implication that he ever was a resident; but even such an implication would not secure against the positive requisition of the section which declares that the debt or demand must be against some other person in the Territory. For let it be remembered through the whole of this argument, that the recitation of the affidavit in the attachment proves affirmatively that David Roberts, the defendant in that proceeding, was not a resident of or residing in the Territory of Arkansas, whereas the section referred to gives this process by a Justice of the Peace, only in cases when the creditor, *i. e.*, any person, holds a debt or demand against a debtor, *i. e.* against any other person in this Territory, and it is not shown in the attachment, or elsewhere, that the plaintiffs in attachment were residents of the Territory of Arkansas. Now, may a non resident creditor sue out this process against a non resident debtor who may have property in the Territory? It is respectfully urged that he cannot; that such are not the persons expressly described in the said 29th sec-

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tion—this is not the meaning and intention of the Legislature, but if so, what Justice of the Peace will have the power, i. e., the jurisdiction to issue the process? This 29th section requires that the application shall be made “to some Justice of the Peace in the county where such debtor resides.” May some Justice of the Peace for the county where the property of the debtor is found issue this process. Such a Justice of the Peace is not the officer contemplated or described by the said section, the jurisdiction or power does not attach to a Justice of the Peace for the county where the debtor’s property may be found, but to a Justice of the Peace where the debtor resides. There is a strong implication in this section that the plaintiff or creditor should be a resident of the Territory as well as the debtor: and shall it be said, no, justified and sustained by our tribunals of legal justice, that a non resident may come into the (then) Territory, and finding another non resident’s property here, subject that property to this harsh and extraordinary process, without the knowledge of the debtor, without his having the opportunity or power of making defence.

There are certain immutable principles of justice inherent in the nature of man—principles which are traced upon the tablet of the human breast by the hand of unerring wisdom; principles which are set forth by the Constitution of your own State as inherent and infeasible—principles which are ingrafted upon the Constitution of the United States—principles which declare that no one shall be deprived of life, liberty, or property, without due process of law. Process which the plaintiff shows himself legally entitled to demand and use—process to which the defendant may be legally subjected—process issued by an officer or legal tribunal legally constituted for that purpose, and to whom the defendant is legally amenable.

What would be the proper affidavit in the several cases which might arise under the 29th section? I will endeavor to give to the court what would be the proper affidavit. It should show that the debtor was at the time, or lately had been, a resident of the Territory, and that he has removed or is about to remove himself, or is about to remove his effects, out of this Territory.

So far as the conduct of the debtor is concerned there are three causes enumerated in this section, which will justify the issuing an at-

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tachment. First, that he, the debtor has removed: Second, that he is about to remove himself: Third, that he is about to remove his effects out of this Territory so that the ordinary process of law cannot be served, &c. If the first cause is the one relied on then the affidavit should be that he, said debtor, has removed himself out of the Territory, &c. If the second cause is the one relied on, then the affidavit should state the fact that he is about to remove himself, &c., and so of the third cause.

The statute ought to be strictly pursued, this being a summary and extraordinary remedy in special cases. 1 *Mar.* 355; 2 *Mar.* 350. And if an inferior jurisdiction can take nothing by intendment, that is by construction, then the moment that we have to resort to construction or intendment, that moment we give up the question. 3 *Salk*, 320. *Guilam vs. Hardisty*.

This statute clearly describes the debtor, and what acts, so far as he is concerned, will subject him to this process, it then directs what to be done on the part of the plaintiff. First, he must show that the debtor was, or is a resident of the Territory, subject by his acts to this process; that he apply to some Justice of the county where the debtor resides, &c. This part of the section defines what Justice shall have power to issue the process. If the debtor was not a resident of any county, (i. e.,) if he was not a resident of or residing in this Territory, then no Justice had jurisdiction, it as well attached to a Justice of Hempstead or Washington county, as to a Justice of Lafayette.

An attachment must be sued out from a Justice of the Peace of the county where the debtor resides. 2 *Marshall*, 451. And the debtor must be a resident of the State. *Ex-parte Schroeder*, 6 *Cow.* 603; 1 *Wend.* 44; 2 *Kent Com.* 402.

If jurisdiction over the subject matter may be limited by the place, according to the principle before adverted to, then here is an instance where the jurisdiction of the subject matter is limited by the county, and only attaches by the concurrent circumstances of the Justice of the Peace and the debtor residing in the same county at the time the application is made. Again, the debtor and creditor must be both residents of the Territory, at least the debtor must, and he must be

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about to remove himself or effects out of the Territory, or must have removed. In all these cases, clearly implying that the defendant must at some time have been a resident. The affidavit in the case before the court, does not show that the defendant, in this case, was a resident of the Territory at any time, but on the contrary, shows that he was a non resident. The three acts of the defendant, any one of which will suffice, the other necessary circumstances concurring, are that the defendant has removed, or is about to remove himself, or is about to remove his effects out of the Territory. Now will the affidavit stating that the defendant is not a resident of or residing in the Territory, so that the ordinary process of law cannot be served on him, fill any of the foregoing pre-requisites? It is not equivalent to a statement that the defendant is about to remove himself or effects. Is it equivalent to a statement that the defendant has removed? Surely it cannot be so taken. One is the statement of a fact which is made up of action, and the fact that the defendant was once a resident; the other is the statement of a fact that embodies only the passive existence of the defendant out of the Territory, and leaves no implication that he was ever was in the Territory. In the construction of statutes four principal rules are laid down and recognized by courts of experience and ability. First, what was the law before the making of the act? Second, what was the evil for which there was no remedy? Third, what remedy did the statute intend to give? Fourth, the true reason of the remedy. Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law. For the law rather infers that the act did not intend to make any alteration in the common law, other than that what is specified. See *Dwarris on Statutes*, ix. *Law Library, construction of statutes*, 43. These rules apply with accumulated force to courts and officers exercising a special and limited jurisdiction, and to special and peculiar laws arising out of statutes made for special cases, not known to the common law.

To apply these principles, and first, it cannot be denied, but that that the proceeding by attachment, as exercised under the statute, is a proceeding not arising out of the common law, but peculiar, special, limited and extraordinary in its origin, application, and effect. Then

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first as to the evil. Owing to the sparse settled state of the country, and large geographical extent of the counties, a debtor could remove himself or effects out of the county, nay, out of the State, before the creditor could obtain process from the Clerk under the first section of the act. And, therefore, the twenty-ninth section of the act was intended to afford a more speedy remedy with regard to persons who were residents, and had property in the county.

A thing within the intention is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute if contrary to the intention of it. 15 J. R. 379, *The Peors. Utica Ins. Co.*

By adverting to the first section of the act, it will be found that this remedy under that section, was not confined to resident debtors, but by a liberal construction might be made to apply to non residents, but surely the 29th section by the most liberal construction cannot be made to apply to non residents. The words of the 29th section confine the remedy to debtors in the Territory, besides the jurisdiction only attaches to a Justice of the Peace for the county where the debtor resides. To illustrate the foregoing principles, see *Hardin*, 95, 65, 342; 1 Mar. 351; 2 Mar. 151, 350; 2 *Caines Rep.* 317; *Fitzgerald's case*, 15 J. R. 196. A Justice of the Peace cannot issue an attachment against a debtor who resides in another county. *Ex parte Schroeder*, 6 Cow. 603; 1 Wend. 44; 2 Kent Com. 402.

It is a clear and salutary principle that inferior jurisdictions, not proceeding according to the course of common law, are confined strictly to the authority given them in every instance. 1 J. C. 20; 10 J. R. 161; 6 Wend. 440; 7 J. R. 77; 6 Cow. 224, 234; 5 *Wheat.* 116; 3 Cow. 208; 1 Saund. 74 and note; 19 J. R. 31, 39; 20 J. R. 207; *Willes*, 199, 30, 122; 3 *Dall.* 382; 4 *Dall.* 8, 12; 1 *Cranch*, 343; 2 *Cranch*, 1; *Fisher vs. Hall and Childress*, 1 Ark. Rep. 278; 2 *Bacon, Execution*, P.; 1 *Salk*, 408; 3 *Salk*, 320, *Guillam vs. Hardisty*, 5 *Monroe*, 388; 1 J. J. Mar. 407; 5 Wend. 170; 15 J. R. 196; 9 Cowen 227, *Latham vs. Edgerton*; 3 *Cranch*, 355; 1 *Wendell*, 215, *Gold vs. Bissel*.

Another objection to the writ is, that it does not specify the sum for which it issued with sufficient certainty.

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Every attachment must state the nature of the demand so specially that a recovery thereon will bar a subsequent demand for the same cause. *Hardin* 95, *note*.

Would an ordinary writ, declaration, or judgment, or execution, be good with a statement of the sum, as in this case, one thousand dollars or thereabouts.

The 29th section has the following provisions, viz: "Whereupon it shall be the duty of said Justice to issue a writ of attachment, returnable to the next Circuit Court for the county in which he resides, commanding the Sheriff, or Constable of his township, to attach the said defendant by all and singular his lands and tenements, goods and chattels, moneys, credits and effects, as is provided in the first section of an act," &c. On turning to the first section of the act, this language is found after other words, "returnable, as other writs, to the Circuit Court for said county commanding him to attach the said defendant by all and singular his lands and tenements, goods, chattels, moneys, credits and effects, or so much thereof as shall be sufficient to secure the debt," &c.

The attachment is for one thousand dollars, or thereabouts; this is uncertain. The statute requires that the sum should be specified, and must be sworn to. By the authorities, the attachment is an execution or *quasi* an execution, and either character should be certain as to the sum. The affidavit stands in place of a judgment, and must embody the same certainty as a judgment; and this certainty is necessary, not only with regard to the sum, but to all matters necessary to be set forth in the judgment and execution. Again, an attachment should not state an alternative cause for suing it out. *Hardin* 65.

"When an inferior court has no jurisdiction of the subject matter, or having it, has no jurisdiction of the person of the defendant, all its proceedings are absolutely void. Neither the members of the court nor the plaintiff, (if he procures or assists in the proceeding,) when presented by a party aggrieved thereby," are protected by the said proceedings. 5 *Wend.* 172, &c.; 10 *Mass. R.* 260, *Barker vs. Root*. And if the proceedings be void for any cause, they will afford

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no justification. *Cunningham vs. Brooklin*, 8 Cow. 178, to the same purport. 3 Cranch 331, *Wise vs. Withers*.

In conclusion, the proceeding by attachment is at the will, and should be at the responsibility of the plaintiff; therefore, if this process be wrongfully sued out, he should be held to answer for all the damages.

In this case the defendant, not being a resident of the Territory, was not subject to this extraordinary proceeding. It was not issued by an officer residing in the county where the debtor resided; the defendant was not stated to be indebted in any specific sum. The nature of the demand is not stated so as to bar a subsequent demand for the same cause; and all these objections appear on the face of the record. The plaintiffs in error, therefore, think they have a just and legal right to claim a reversal of the judgment in this cause.

PIKE & COCKE, *Contra*:

The first question presented, and on which it is apprehended the plaintiffs principally rely, is as to the admissibility of the writ of attachment as evidence in the defence.

This question, it seems, might be disposed of by one suggestion—that, inasmuch as the plaintiffs set out the substance and effect of the writ in their second count, the defendants were clearly entitled to read it in evidence, and to have the benefit of any misdescription thereof, or variance between it and the count. Nothing can be clearer than his position.

But the defendants relied upon it as evidence under the first count also, and do not object to meeting the whole question which the plaintiffs desire to present to the court.

Two principal objections were taken to the introduction of the writ in the court below, and have also been raised here. They are, first, that a writ of attachment, under the law then in force, could not issue except for a debt certain; and not for damages; and in any event, not upon a claim based on damages arising from a tort, as this was claimed to be: and also that the declaration filed in the case, upon the return of the writ, was in *case*, and as the writ could only

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issue to enforce the performance of contracts or secure the damages arising from breach of contract, therefore the writ had improperly issued, and could be no defence. The second objection was based upon the 29th section of the former attachment law, *Steele*, 88, and was that as the attachment could only issue to the county "where the debtor resides," and as the affidavit showed that Roberts was not then residing in the county of Lafayette, therefore the writ was void.

We shall examine these questions in the order in which they are presented, but desire first to ascertain that the writ, if valid, and properly issued, was admissible under the first count, and upon the plea of the general issue.

The general doctrine upon this point is thus laid down by Saunders, (1 *Pl. and Ev.* 345.) "In an action on the case, the general issue, 'not guilty of the grievances,' puts in issue all the averments of the declaration; and whatever will, in equity or conscience, according to the existing circumstances, preclude the plaintiff from recovering, may be given in evidence by the Defendant under this plea; because the plaintiff must recover upon the justice and conscience of his case, and that only. 1 *Ch. Plead.* 432." And he further lays it down that under this plea the defendant "may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may give in evidence any justification or excuse of it, or show a former recovery, release, or satisfaction. See *Bird vs. Randall*, 3 *Burr.* 1373; *Barber vs. Dixon*, 1 *Wils.* 44; *Brown vs. Best*, 1 *Wils.* 175.

So in trover, under the general issue, the defendant may show any ground of defence which proves that the conversion was lawful, or that trover is not maintainable. 2 *Saund. Pl. and Ev.* 872.

These principles being established, and the gist of the action being the wrongful conversion, it follows, that to show, under the general issue, that the property was taken by virtue of a writ, regularly issued, and upon sufficient premises, and regularly served, would at once negative the right of the plaintiffs to recover.

The record, as it has come up here, exhibits the naked fact, that the defendants were permitted to read the writ of attachment. The affidavit on which the writ issued, the attachment bond, and the return of the Sheriff are made no part of the record, by bill of excep-

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tion or otherwise, although they are irregularly copied by the Clerk into the transcript. See *Lenox vs. Pike*, *ante*. This being the case, the plaintiffs fail to show to the court here, either that the writ was improperly issued, or irregularly served, and therefore, as this court will now make every presumption in favor of the decision of the court below, and hold it to be right until the contrary is made affirmatively to appear, it must here be taken that the writ must have had some bearing upon the case, and was properly admitted in evidence.

But although it is undoubtedly true that upon this ground alone the decision of the court must of necessity be sustained, yet we have no objection to meet the question in the same manner as though the affidavit, bond, and return, were part of the record here, and shall proceed to do so.

First, then, it is objected that the writ issued upon a cause of action which could not, by the statute then in force, warrant the issuance of such a writ: that it was issued in an action for damages, founded on and arising from a tort, and was not for a debt certain, for which alone, it is contended, attachment would lie. What form of action was adopted in the Circuit Court, at the return of the writ, (till which time it was not necessary to file the declaration,) does not appear; for the form of action nowhere appears in the writ; and we have a right to claim that the declaration, when filed, was in *assumpsit*.

Great stress is laid upon the position that the damages claimed in the case arose from a tort—but this is altogether a mistake. The damages arose from a breach of promise, implied from the consideration of hire, and *assumpsit* is the natural and appropriate action for the recovery of such damages. It is true that such a breach of promise may also be the foundation of an action on the case, *ex quasi contractu*, and a party is allowed to declare either way. See 1 *Saund. Pl. and Ev.* 337; per ABBOTT, C. J., in *Burnett vs. Lynch*, 5 B. & C. 702; *Govett vs. Radnidge*, 3 East 70. The case last cited was against a common carrier who was alleged to have loaded a certain hogshead of treacle on a cart for reasonable reward paid to him and two other defendants; and that the three had so negligently conducted themselves in the loading of it that it was staved and the treacle lost. It

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was an action of case, and a verdict of not guilty was found as to the two other defendants, and of guilty as to Radnidge. A motion was made to arrest the judgment, and the ground taken was that the cause of action was *quasi ex contractu*, and so the finding of not guilty as to two defendants negatived the joint contract, and there could be no judgment on the verdict against the third. To establish this position, the case of *Boson vs. Sandford*, 2 Shower, 478; 2 Salk, 440; 3 Lev. 258, and 3 Mod. 321, was quoted, which was an action in case against ship owners, who had agreed to carry goods for freight, and suffered them to be damaged. In that case, it is said in Shower, that "the Lord Chief Justice seemed to be of opinion that all the owners should have been joined"—and in Salkeld, that "the court held that this was not an action *ex delicto*, but *ex quasi contractu*, and that it was not the contract of one but of all; that there was no other tort but the breach of trust; therefore the court gave judgment for the defendant because all the owners were not joined." Levinz states further that Holt, C. J. held, that the owners were not chargeable as trespassers, for then one of them might be charged alone, but in point of contract, upon their receipt of goods to be carried on hire. Lord KENYON, in *Buddle vs. Wilson*, 6 T. R. 373, expressed the same opinion; and it was upon these authorities contended in *Govett vs. Radnidge*, that an action against a common carrier for neglect, &c., was essentially an action *ex contractu*, or at least *ex quasi contractu*. But Lord ELLENBOROUGH, upon the authority of *Dickon vs. Clifton*, 2 Wils. 319, held that the party might consider either way, either as a neglect of duty or a breach of promise.

The writ then, which is here questioned, did not issue upon a cause of action *ex delicto* at all, but the damages claimed, were claimed as resulting from a breach of promise.

Let us now examine the statute, and see whether such a writ could issue upon a claim for damages, as well as for a debt certain. It will be found in *Steele*, p. 88, sec. 29; and it provides that in all cases where any person has any *debt or demand*, &c., upon affidavit that the person is indebted to him in a sum exceeding fifty dollars, &c., he may sue out his writ before a Justice returnable to the Circuit Court. Clearly this is not restricted to a debt certain. It extends, in its

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terms, to "*any debt or demand*," and no form of action is required to be named in the writ. True the affidavit must run, that the defendant is *indebted*, and so it did in this case, but we shall see that this is of no importance, nor does it carry the consequences imagined by the plaintiffs.

In Pennsylvania, by the act of 1705, the writ of foreign attachment was given for the "*restitution of debts contracted or owing*." See *Serg. on attach.* 286. Under this law, it is laid down by Sergeant, that a writ of attachment will issue in that State in other actions than those of debt and detainee. And he remarks that "although, according to a strict and literal construction of the act of assembly, the foreign attachment is confined to cases of debt, yet as this is not the only case within the mischief intended to be remedied by this law, the construction given to it is of a more extensively remedial nature." *Serg.* 43. And in *Fisher vs. Consequa*, 2 *Wash. C. C. R.* 382, where a writ of attachment had issued under the same law upon a demand for unliquidated damages, it was contended for the defendant that neither by the custom of London, nor under the act of assembly, could a foreign attachment lie, except in cases of debt. WASHINGTON, Judge, admitted, that according to the strict and literal construction of the act, the writ was confined to cases of debt. But he observed that "this is a remedial law, and ought, upon the soundest principles of construction, to be so extended as to remove the mischief and advance the remedy." He decided that a demand might be a debt within the meaning of the act, although unliquidated, if it arose out of a contract, and if the measure of damages was such as the plaintiff could by affidavit aver to be due; and further, that the remedy embraced demands which could be enforced by an action in the case, as contradistinguished from actions of *assumpsit*.

So in *Lenox, et al., vs. Howland, et al.*, 3 *Caines R.* 257, 323, which was an action for damages sustained by the running ashore of a vessel of the defendants, laden with goods of the plaintiffs, by the negligence or misbehavior of the captain, whereby the goods were damaged; and in which case a writ of attachment had issued, under a statute of New-York, which required an affidavit that the defendant was *indebted* to the plaintiff in the sum of one hundred dollars or

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upwards; LIVINGSTON, Judge, said that although such affidavit was required, yet it did not follow "that the demand is to be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury." "The law," said he, "is remedial, and should be so construed as to embrace as many cases as possible. Being *indebted*, is synonymous with *owing*; it is sufficient, therefore, if the demand arise on contract." In support of this opinion he mentioned, that the 16th section of the law spoke of any *claim, debt or demand*; and on the 21st section, by which it is provided that the attachment should be superceded, if the debtor would give security to appear and plead to any action to be brought against him, in *any court of law or equity*." So our statute mentions "*any debt or demand*." He further said, "nor ought the form of declaring to vary the case. Nor can the difficulty of ascertaining the precise damages make any difference. If a carpenter contracts to build a house for a given sum, and does it so negligently that it falls the very next day it is finished, and then absconds, possessing a large property, it would be strange that I should have no remedy, because it is necessary to declare against him for a mis-feasance or non-feasance, or because it may require some little calculation to settle the damages. The substantial inquiry, in this stage of the proceeding, must be to ascertain whether the party has a legal claim arising on contract, not by what kind of action it is to be enforced." And therefore he concluded that "as the demand, then, is founded on contract, it can be of no importance in what way the injury arose, nor can we say it is of a kind not to support the attachment."

The other objection to the writ scarcely merits a remark. It is that the affidavit does not show that Roberts was residing in Lafayette county when the writ issued. It is true that the law provides that the plaintiff may apply to "some Justice of the Peace for the county where the debtor *resides*"—but this cannot mean that the debtor shall be residing there when the affidavit is made, because the writ is given whenever the defendant *has removed* out of the Territory and upon affidavit that he "*is not a resident of the Territory*." It may mean some Justice of the county where the debtor has usually resided. Nor could the plaintiff be required to swear, first that his

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debtor was a non-resident of the State, and then in the same breath, that he was then residing in the county. Moreover, admitting that the attachment could only issue in the county where the defendant last resided, as in Kentucky, still it was not necessary for the writ to contain any allegation on that point; and if the debtor had not been last a resident of the county where it issued, the defendant could only avail himself of this objection by abating or quashing the writ; and the writ was valid until that was done. *Plumpton vs. Cook*, 2 *Marsh.* 451.

Having therefore demonstrated, that the affidavit in this case complies fully with the statute—that it is based upon, and sets out a *demand* founded on contract; and that the writ is formal and regular, it results, of course, that the writ regularly issued, and that a levy under it was valid, and could not be a conversion. The first assignment of errors is therefore disposed of. The instructions of the court, those given as well as those refused, form no part of the record. They are not so incorporated in or even referred to in, the bill of exceptions as to make them a part of the record, and consequently none of the grounds of error, based upon the instructions, are shown to exist. There is no attempt to make them a part of the record, except in the motion for a new trial, where it is stated, that the court erred “in refusing the first and second instructions asked by the plaintiffs’ counsel; and in giving the instructions to the jury asked by the counsel for the defendant.” Instructions cannot thus be made a part of the record; and it does not help the case that the clerk below has sent up here two papers purporting to have been filed in the progress of the case. As little does it appear to the court here that the court below either gave or refused any of the instructions. That fact is not proven either by the endorsements “*given*” and “*refused*” which appear here and there on those papers, by whom made nobody knows; nor by the fact that such an allegation was made in their motion for a new trial. That motion might have been overruled because the allegations made in it were untrue in point of fact. This court decides only from the record; and there is no record, either of what instructions were asked, or, if *any* were asked, of what were given and what refused. See *Goldsbury vs. May*, 1 *Lit.* 254; *Law vs. Merrils*, 6 *Wend.* 268.

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Even were this not the case, yet the instructions, except the first which is stated in the assignment of errors to have been overruled, were asked upon abstract questions of law. No evidence is brought up here, so as show this court that there was a state of case below to which the instructions were applicable. For example, the assignment states the refusal of the court to instruct the jury, that "*if they should find,*" that the steamboat was the joint property of the plaintiffs, then the writ of attachment was no protection. What *did* the jury find? Where is the evidence that the plaintiffs were joint-owners of the steamboat? If this refusal to instruct was wrong, the plaintiffs here can have no advantage of it, except by showing to the court that they were prejudiced by it. That can only be done, by showing that they *had* proven that they were joint-owners.

So again it is assigned for error that the court instructed the jury that, in order to find against the defendants, they must find certain facts with regard to the sheriff's negligence and the co-operation of the defendants in, or the causing of, that negligence. No evidence whatever is brought here, to which that instruction is applicable. It might have been wrong, and yet there might have been other evidence sufficient to warrant the finding, notwithstanding the instruction, or there might have been no evidence whatever that the boat was lost, or if so, that the sheriff was guilty of any negligence whatever.

We make these points, because we desire the practice to be definitely settled—not because we shrink from meeting the questions attempted to be raised. Taking the questions presented by the assignment of errors as mere abstract questions of law, and the court below was right—right in every point, beyond the shadow of a doubt.

Was the court below correct in deciding that under a writ of attachment against one part owner of a vessel, the whole vessel may be seized by the officer? Undoubtedly. The assignment of errors speaks of "*partnership property.*" There is no partnership in the matter. Joint-owners of a vessel are not partners as to the vessel; though they may be as to the freight. This position hardly needs a reference to authority to sustain it. See however, *Nicoll vs. Mumford*, 4 J. C. R. 523; *ex parte Young*, 2 Ves. and Bea. 242; *ex parte Parry*, 5 Ves. 575; *Nicoll vs. Mumford*, 20 J. R. 635, per SPENCER,

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Chief Justice; 3 *Kent Com.* 16, 17; *Story on Agency*, 42. Admitting therefore that the whole *partnership* property cannot be levied on, or seized by attachment for the debt of one *partner*, let us see if the whole of a chattel held by several tenants in common, cannot be seized for the debt of one of them, though only his interest in the chattel can be sold.

In *the matter of Smith*, 16 *J. R.* 105, the Supreme Court of New-York decided that an attachment, under the act for relief against absent and absconding debtors was analagous to an execution, in this respect, upon the authority of *Morley vs. Stromborn, et al.*, 3 *Bos. and Pul.* 254, and *The matter of Chipman*, 14 *J. R.* 217—and that in such case, where the writ was against an absconding *partner*, the sheriff could only seize the separate property of that partner; and added, “the case of partners is different from that of tenants in common of a chattel.” So in *Mersereau vs. Norton*, 15 *J. R.* 179, which was a case almost precisely parallel with this. The court said, that the only question raised was, whether the Sheriff, under an attachment, has a right to take and sell property, of which the absconding debtor was only a tenant in common, when that property is found in the possession of the other tenant. And the court said, “of this there can be no doubt. The Sheriff in such cases seizes *all*, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided, and the vendee becomes tenant in common with the other partner—and even where the Sheriff sells the joint property as the sole property of the defendant, still no more than the defendant’s interest passes; and the purchaser becomes tenant in common with the original co-tenant of the defendant. The same point was decided, as to an execution, *Heydon vs. Heydon*, *Salk.* 392, and *Smith vs. Stokes*, 1 *East.* 367.

As to the fourth assignment, to offer an argument upon it would be superfluous. No court has ever decided that because a plaintiff orders execution to issue, *therefore* he is liable to the defendant for the Sheriff’s negligence in keeping the property levied on ;and if not liable in case of an execution, as little could he be liable in case of an attachment. It is not his act that the Sheriff fails to exercise proper care. The negligence of the Sheriff, and consequent loss of the pro-

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perty does not flow from the act of the plaintiff in issuing the process. It is independent thereof—so much so that the plaintiff himself has his action against the Sheriff.

In every aspect of this case it is conclusive against the plaintiff. There is nothing tangible upon which this court can base any action or exercise any judgment. At every step we wander into the realms of fanciful supposition. Taking the case *stricti juris*, there is nothing before the court but the naked verdict and judgment, and the writ of attachment. The plaintiffs do not show to the court that the writ issued on improper premises—they fail to show on what property it was levied—they fail to show that the plaintiffs had any interest in the property levied on, or if so, whether their interest was joint.

Admit the return to be part of the record, and it shows that Jett, the co-defendant of these defendants in error, delivered over all the property levied on to his successor in office, and of course no recovery could be had on the second count.

Furthermore, if all the papers sent up, are to be taken as part of the record, or even resting upon the second count itself, the plaintiffs show no cause of action for negligence. A levy upon sufficient personal property to satisfy the execution, is a satisfaction of the debt. *Shepard vs. Rowe*, 14 *Wend.* 262. It is so deemed, because the defendant is divested of his possession and control of the property. It is lost to him. *Hoyt vs. Hudson*, 12 *J. R.* 207; *Clark vs. Withers*, 2 *Ld. Raym.* 1072; 1 *Salk*, 322. He is discharged, even if the Sheriff waste the goods, *Ladd vs. Blunt*, 4 *Mass.* 403. By a lawful seizure the defendant loses the property in the goods. *Ib.*; *Jackson vs. Peer*, 4 *Cow.* 417. Upon such levy the Sheriff becomes responsible to the plaintiff. *Clark vs. Withers*, *ubi sup.*; *Starr vs. Trustees of Rochester*, 6 *Wend.* 562. The same reason would make a levy under an attachment a satisfaction of the debt—more especially, as by our statute, execution only runs against the property attached. Undoubtedly the Sheriff would be liable to the plaintiff for negligence in keeping property levied on by attachment, and if so the defendant could have no action against him, unless where the value of the property levied on was greater than the debt claimed and due. The plaintiff here does not show that the property was worth more, or a verdict recov-

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ered for less than the \$1,000 claimed in the affidavit—and of course he shows no cause of action.

Again, by the levy, if the writ was regular, the property in the boat was divested from Roberts, and Jones and McKean became co-tenants of the boat with the Sheriff, until she was sold, and then with the purchaser. Roberts, having no longer any property in her, shows upon the face of the declaration, that he is not entitled to sue, and that there is a misjoinder of plaintiffs.

LACY, *Judge*, delivered the opinion of the court:

The record in this case presents but a single question for our decision, which is, did the court below err in permitting the defendants to read to the jury the writ of attachment as evidence in the cause. It is insisted on behalf of the plaintiff, that the court erred in refusing to give certain instructions asked for by him, and also in granting others, at the instance of the defendant; but before we are at liberty to examine the correctness or incorrectness of these instructions, it is necessary to ascertain if any such instructions were asked for, refused, or given, and excepted to upon the trial, and made a part of the record. We have found this inquiry every way easy of solution. It is perfectly clear that the record wholly fails to show any one of these facts. It is true that the Clerk has copied into the transcript certain instructions, and has marked them filed, and has written upon the margin opposite to each instruction, the word "given" or "refused." These entries are mere *clerical memoranda* made without any order or authority of the court, and consequently they cannot be regarded as forming any part of the record in the case.

It is said that the instructions properly belong to the record, because the plaintiff in his motion for a new trial refers to them, and that the court below in overruling his motion, put them on file upon the rolls. The position is wholly untenable. The plaintiff in error moved the court for a new trial; first, because the verdict was contrary to law; and secondly, because the court erred in giving and refusing certain instructions to the jury. The motion for a new trial was overruled, and the party making it, did not except to the opinion of the court, in deciding the points. It is impossible for this court judicially to know

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upon what grounds the motion for a new trial was refused. The presumption is in favor of the verdict and judgment below, and they must stand until they are overthrown by other affirmative proof. In the present instance there was no exception filed to the opinion of the court overruling the plaintiffs' motion for a new trial, and that circumstance alone conclusively proves that there was no error in the opinion given, or if there was, the defendant expressly waived it, by not excepting at the time. For aught that appears from the record, the court below refused to grant a new trial upon the ground that no such instructions as were referred to in the motion, were ever asked or insisted upon, or reserved at the trial. The instructions, therefore, may or may not have been given or refused upon the trial, but as they form no part of the record before this court, we cannot regard them in any decision we may make affecting the merits of the controversy now pending. This point has been expressly ruled in *Gray vs. Nations*, 1 Ark. 557, and *Lenox vs. Pike and wife*, and *Smith and wife*, ante.

The record in this case presents another preliminary question, which is, where a party excepts during the progress of a trial, and afterwards there is a verdict and judgment entered up against him, and he thereupon moves for a new trial, whether that is not a waiver of his exceptions? As this point is one of much interest and magnitude in practice, we do not think it advisable to express any opinion in regard to in the case now under consideration, especially as we have not a full bench, and the same result follows in the decision we are about to make.

The only question then to be decided is, was the writ of attachment properly or improperly admitted as evidence in the case? In order to arrive at a just conclusion upon this point, it is necessary to consider the character and form of the action, and what the pleadings put properly at issue.

An action on the case, properly so called, is founded upon the mere justice and conscience of the plaintiff's right to recover, and is in the nature and effect of a bill in equity. Therefore a recovery, release, or satisfaction need not be pleaded, but may be given in evidence under the general issue. Whatever will in equity, or in conscience, preclude the plaintiff's right of recovery.

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ry may be given in evidence in an action on the case. And the reason according to Chitty is that "the plaintiff must recover upon the conscience of his case, and upon that only." In action therefore upon the case, under the plea of not guilty, the defendant can not only put the plaintiff upon proof of the whole charge contained in the declaration, but he may give in evidence any justification or excuse of it, which will defeat the plaintiff's right of action. 1 *Ch. Pl.* 487; *Bird vs. Randall*, 3 *Burr.* 1365; *Barber vs. Dixon*, 1 *Wils.* 45; 2 *Saund.* 155, *a. u.* So in trover, under the general issue, the defendant may show any ground of defence, which proves that the conversion was lawful, or that trover was not maintainable. 2 *Saund. Pl. and Ev.* 872.

The affidavit upon which the writ issued, and all other proceedings prior to the issuing of the writ, are made no part of the record by bill of exceptions, or otherwise. This being the case, the plaintiffs have failed to show to this court either that the writ was illegally issued, or irregularly served. We are bound to presume in favor of the decision of the court below, until the contrary is made affirmatively to appear. Again the second and third counts do not allege that the writ of attachment was either improvidently or illegally issued, and therefore under these counts, the illegality of the proceedings of the Justice of the Peace cannot be questioned or put in issue.

The liability of the defendants, if it exists at all, under the second and third counts, arises from their laches or negligence, in keeping the property levied upon. If the writ of attachment is competent evidence in the case for any purpose whatsoever, of course the defendants below had a right to read it to the jury. The plaintiffs recited and set out in the second count of their declaration, the affidavit upon which the attachment issued, the writ itself, and also the levy and return of the Sheriff. Having referred to these papers, or made these recitals, was it not lawful for the defendants to introduce the writ of attachment as evidence upon the trial?

The plaintiffs having voluntarily, by their own act, made the writ a part of their declaration, they have certainly no right to object to its going in evidence to the jury. The defendants, by its introduction, only prove what the plaintiffs had alleged. If the Sheriff, as the

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plaintiffs have declared, acted under authority, and by virtue of the writ, at the instigation and direction of the defendants, he surely acted under color of the law, and consequently, the writ furnished a good excuse, if not a complete justification to the defendants. The writ itself recited the affidavit upon which it was founded, and was issued by an acting Justice of the Peace; and this being neither controverted nor denied, but expressly admitted and insisted on in the second count of the declaration, the presumption obtains that it was properly issued and regularly executed, and consequently legitimate proof in the case. The recital of the affidavit in the writ may be regarded as part and parcel of the writ; and as that recital is not inconsistent with the provisions of the statute, authorizing such a proceeding, the legal conclusion is irresistible that the defendants in error laid a proper foundation for the attachment, and that the Justice of the Peace acted correctly in issuing the writ, and directing it to the Sheriff.

This brings us to the consideration of the only remaining question, which is, had the Justice of the Peace lawful power and authority to issue the writ, returnable to the Circuit Court, or were all his acts and proceedings therein illegal and extra-judicial. This latter proposition has been argued with much earnestness, and very considerable ability and learning by the plaintiffs' counsel; which has induced us to give to this branch of the subject the most mature reflection and investigation. The result of our enquiries will now be stated. There being no proof in the record that either the Sheriff or the defendants were guilty of any laches or negligence in keeping the property after the levy, or while it was in custody of the law, their liability, if it exists at all, must depend wholly and exclusively upon the illegality of the proceedings before the Justice of the Peace. Under the count in trover, they may be so charged, provided the facts show a tortious taking and conversion of the property. In form the action of trover is a fiction; but in substance it is a remedy to recover the value of a personal chattel wrongfully converted by the defendant. The injury lies in the conversion, and that constitutes the gist of the action. In order to support the action two things are necessary for the plaintiff to prove: First, property in himself, either general or special; and

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second, a wrongful conversion by the defendant. The conversion may be proved by a wrongful taking, or by an illegal assumption of ownership, or by an unwarrantable detention. In the present instance, if the plaintiffs had showed a tortious taking of the property by an unlawful levy, then they had established a conversion, and the action would lie. 1 *Ch. Pl.* 148, 149, 153; 3 *Black. Com.* 161, 162, 163; *Rackham vs. Jessup*, 3 *Wils.* 332; *Cooper vs. Chitty*, 1 *Burr.* 20; 2 *Saund. R.* 47 a, n. 1.

The proceedings were commenced and prosecuted under an act of the General Assembly of the Territory of Arkansas, approved October, 22, 1823. The 29th section of the act declares that "in all cases where any person has any debt or demand against any other person in this Territory, and he shall have good cause to believe that said debtor has removed or is about to remove himself or effects out of this Territory, it shall be lawful for such creditor, in all cases where the demand shall exceed the sum of fifty dollars, to apply to some Justice of the Peace for the county where the debtor resides, and to file his affidavit in writing, stating that the person (naming him) is indebted to him in a sum exceeding fifty dollars, and that he has good cause to believe that the said defendant is not a resident of or residing in this Territory, or that he is about to remove himself and effects without this Territory, (as the case may be,) so that the ordinary process of law cannot be served on him, and he, the said plaintiff is thereby in danger of losing his said debt; whereupon, it shall be the duty of said Justice to issue a writ of attachment, returnable to the next Circuit Court for the county in which he resides, commanding the Sheriff or Constable of his township to attach the said defendant, by all and singular his lands and tenements, goods, chattels, moneys, credits, and effects, as is provided in the first section of an act entitled "an act to provide a method of proceeding against absent and absconding debtors." A Justice of the Peace certainly possessed the power under and by virtue of this section to issue a writ of attachment returnable to the Circuit Court, provided there is nothing in the organic law, or any subsequent Territorial act forbidding it.

The act of Congress organizing the Territorial Judiciary, vests its power in a Superior Court, and in such inferior courts as the Legisla-

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lature may from time to time institute and establish, and in Justices of the Peace. The act, in defining and limiting the original and appellate jurisdiction of the Superior Court, contains no limitation or restriction upon the legislative power in regard to establishing inferior tribunals, or in prescribing the duties of its officers. In the exercise of this discretion full liberty is given the Legislature to organize the inferior courts in any manner they may deem advisable for the public good: provided in doing so, they do not interfere with the original or appellate jurisdiction of the Superior Court. This being the case, the legislature possessed ample power to give to a Justice of the Peace authority to issue a writ of attachment, and make it returnable before the Circuit Court, in such manner and under such regulations as they might think proper to prescribe. There is no prior or subsequent act of the Territorial government repealing the 29th section of the statute above recited; and, therefore, this court does not take upon itself to determine whether the issuing of the writ is a judicial or ministerial act. For by the organic law, and under the Territorial Government, a Justice of the Peace was competent to perform either or both acts, at one and the same time, or at different times.

The question then recurs, what is the true meaning and construction of the 29th section of the act regulating the proceedings in case of attachments? The terms and provisions of the act are somewhat confused and contradictory; but its meaning and objects are readily discoverable from the evils intended to be remedied, and the means employed for that purpose. A Justice of the Peace has no authority to issue the writ unless the party applying for it brings himself within the provisions of the act. What, then, is the affidavit required to state? Simply that the defendant *is indebted to the plaintiff* in a given sum, which is above fifty dollars, and "that he has good cause to believe the defendant is a non-resident of, or about to remove himself or effects without the Territory, so that the ordinary process of the law cannot reach him, whereby the plaintiff is in danger of losing his debt." The writ lay, then, against resident or non-resident debtors; or against such persons as were endeavoring to remove themselves and effects beyond the jurisdiction of the Territory; and upon any demand, liquidated or unliquidated, that exceeded fifty dollars. The

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Justice of the Peace is bound to issue his writ in the county where the defendant's property can be found, and the writ is made returnable to the Circuit Court. It was intended to secure to creditors the payment of their debts, in all cases where their debtors attempted to remove themselves or effects beyond the jurisdiction of the court, or limits of the Territory. The act is evidently remedial in its nature and character, and therefore must be construed liberally to prevent the mischief for which it was enacted. This principle will be found fully sustained and illustrated in many of the adjudications upon the issuing of writs of attachment under statutes similar to our own. *Fisher vs. Consequa*, 2 Wash. C. C. R. 382; *Lenox, and another, vs. Howland, and another*, 3 Caines R. 257 and 323; *Sergeant upon Attachments*, 286. If this principle be true, then a writ of attachment would lie under the act of 22d October, 1823, as well upon an unliquidated as a liquidated demand. The words of the statute are, "if any person is indebted to another in a sum exceeding fifty dollars." What is the meaning of the term indebted? Is it confined to a debt or demand certain? Or does it include damages arising from a breach of contract that may be rendered certain? The term is certainly general in its meaning and in its application, and is certainly synonymous with owing. To give it any other construction, would certainly not prevent the mischief, or advance the remedy given by the statute. The statute being remedial, embraces all cases where, upon any claim or demand, one person is indebted to another in a sum exceeding fifty dollars. The affidavit is the foundation of the Justice's authority to issue the writ.

To put any other construction upon the act, would be to authorize non-resident or absconding debtors to withdraw their means or effects beyond any legal process whatsoever. The idea that a creditor and debtor must both have been residents of the Territory before an attachment could issue, is wholly untenable. It is expressly contradicted by the words of the act itself, and it is alike forbidden, as well by all true rules of construction upon remedial statutes, as by its spirit and intention.

The mischief intended to be prevented certainly would not be remedied if a non-resident or absconding debtor was allowed, by such

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an interpretation, to defeat the just claims or demands of a resident or non-resident creditor. In the case now before the court, so far as the writ of attachment recites the facts of the affidavit upon which it is founded, they are in strict conformity with the regulations of the statute, and almost a literal copy of the act. The Justice of the Peace was then fully authorized to issue the writ, and as the officer acted in obedience to its commands, he was strictly justifiable in making the levy.

If the view we have taken of this subject be correct, then the Territorial Legislature, as well as the Justice of the Peace, acted *strictly* within the pale of their organic and legal duties, and of course the defendants in the action could not be liable in trover as for a tortious conversion of the property by an unlawful levy, under the first count in the declaration. The judgment of the court below must therefore be affirmed with costs.

JOHN DILLARD *against* NOEL, ADM'R OF NOEL.

ERROR to Pulaski Circuit Court.

The jurisdiction of Justices of the Peace in matters of contract is expressly defined and limited by the Constitution, and the Legislature has no control over it.

The jurisdiction of the Circuit Court in matters of contract is not exclusive, and therefore in such matters the Legislature may vest a concurrent jurisdiction in other tribunals; but cannot divest the Circuit Courts of such jurisdiction, or restrict or prohibit its exercise, so far as depends on the sum in controversy.

The jurisdiction of the Circuit Courts, and of Justices of the Peace, in matters of contract, is to be determined solely by the sum in controversy; and when a defendant voluntarily enters his appearance, or is found, or legally served with due process or notice, the jurisdiction is acquired without regard to the residence of either of the parties.

So much of the 4th section of chapter 116 of the Revised Statutes, as confines the bringing of suits in the Circuit Court, in cases where the defendant resides in the State, to the county where the defendant resides, or where the plaintiff resides and the defendant is found, is unconstitutional and void; and no averment in the declaration as to the residence of either party, is necessary for any purpose whatever.

Credits endorsed on a note or bond, although set out on oyer, form no part of the note or bond, and become no part of the declaration, nor can they be noticed or regarded on demurrer.

They are merely evidences of payment, of the same grade as a receipt, and may be explained or controverted by the plaintiff.

Consequently, if such endorsements show the sum in controversy to be below the jurisdiction of the Court, no advantage can be had of it on demurrer. The only way to raise the question is by plea in abatement, a finding upon which would settle the question of jurisdiction.

A plea to the jurisdiction comes too late after demurrer, and will be stricken out.

When separate pleas of payment were filed to separate counts, the court was not required to instruct the jury that they should find on each count separately; but is right in instructing them to find generally.

This was an action of debt, instituted by the defendant in error against the plaintiff in error in the Circuit Court of Pulaski county. The declaration contained three counts, upon three several writings obligatory for the sum of \$187, each, of which the defendant below prayed oyer, which was granted by exhibiting the originals, and filing a true copy with a statement signed by the attorney for the plaintiff, that upon the first writing was endorsed a credit of one hundred and twenty-five dollars; and upon the last a credit of one hundred dollars. The defendant then demurred to the declaration, and specially expressed, as causes of demurrer, first, that it did not appear from the declaration, that the defendant was a non resident of this State, or

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resided in the county of Pulaski, where the suit was instituted, or that the plaintiff was at that time a resident of said county, and therefore no case was shown of which the Circuit Court had jurisdiction. Second, that it appeared upon oyer that the sum in controversy upon the contract set forth in the first count in the declaration, being the balance, including interest, due upon the writing obligatory therein mentioned, did not exceed one hundred dollars, and the like defect or imperfection was specially stated as to the third count. The demurrer was overruled. The defendant then filed to the first and third counts in the declaration, separate pleas in abatement, to the jurisdiction of the court, averring that the residue unpaid on the contracts therein respectively mentioned, did not severally amount to the sum of \$100; and that the sum in controversy upon said contracts, severally and respectively, was within the exclusive jurisdiction of a Justice, or Justices of the Peace; which, on motion of the plaintiff, were struck out by the court. The defendant then pleaded two pleas of payment, one to the first, and the other to the third count of the declaration; to which the plaintiff replied and the defendant joined issue, and judgment by *nil dicit* was entered upon the second count, and a jury empannelled and sworn, who returned the following verdict, "we the jury find for the plaintiff on both issues, and say that said defendant owes as in said first and third counts alleged, to said plaintiff as administrator as aforesaid, a balance of debt to the amount of one hundred and eighty-two dollars and sixty-six cents, and assess his damages for the detention thereof at fifty-one dollars and nineteen cents," upon which judgment was entered in favor of the plaintiff, for the whole amount of debt, due upon the several obligations mentioned in the declaration, as well as for damages and costs.

Upon the trial before the jury the defendant moved the court to instruct the jury, that under the issues joined in the case they should find for the plaintiff or defendant, as the case might be, upon each issue separately, which motion the court overruled, and refused so to instruct the jury, and instructed the jury that under the issues joined in this case they might find for the plaintiff or defendant, as the case might be, in one finding and not separately upon each issue; to which

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opinions of the court refusing to give the instructions asked, and so instructing the jury the defendant accepted.

ASHLEY & WATKINS, for plaintiff in error:

The first error set out in the assignment in this case is, that the court below overruled the plaintiff's demurrer to the declaration.

The ground of that demurrer was, that the plaintiff in the court below no where averred in his declaration, either that he was a resident of Pulaski county, or that the defendant was a resident of said county, or that he was a non-resident. Some one of these circumstances are requisite to entitle a party to sue, otherwise the court will not have jurisdiction. Assuming the principle to be correct, that all the courts in this State are statutory courts, which have no common law jurisdiction whatever, but whose jurisdiction is expressly limited and defined by statute, according to analogous decisions in the courts of the United States, an averment of residence is necessary to entitle the plaintiff to sue. If he omits this, his case is not made out, and the omission is ground of demurrer; and, when this court in the case of *Jarrell vs. Wilson*, 1 Ark. 137, decided that a party pleading over abandoned the ground he had taken on demurrer, so that he could not afterwards take advantage of it, on error, it properly and providently limited the rule to cases where there was a sufficient cause (or right) of action apparent on the declaration.

The second assignment of errors is, that the court below struck out the two several pleas of the plaintiff in error, to the jurisdiction of the court, as to the first and third counts in the declaration: this was after the grant of oyer of the writings obligatory, sued in the first and third counts, showing the several credits endorsed upon them. It may be contended that the writings sued on were nugatory, because the defendant below was not entitled to oyer of them, but he would have been entitled to the production of them, by petition to that effect; and the credits were granted on oyer to save the delay and trouble of that proceeding. It was apparent, then, of record, to the court, that it had not jurisdiction of the sum in controversy in the first and third counts of the declaration. But the question is not whether these pleas to the jurisdiction are sufficient in law, upon demurrer, or whether the facts stated in them would have been found to be true

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if issue had been taken upon them; the only question is whether they are so informal and irregular as to authorize the court below in striking them out, without requiring the opposite party either to demur or reply. This question the court here must settle by inspection of the pleas themselves. Our statute does away with the necessity of an affidavit of the truth of a plea to the jurisdiction; and the arbitrary rule of English practice, that a plea to the jurisdiction must be subscribed by the party himself, in its spirit and reason has no existence in this State. There a plea to the jurisdiction was a mere personal privilege, which the party himself could alone take advantage of, as that he was only liable to be sued in some other court or jurisdiction. Such pleas were not favored by the courts of general jurisdiction, who sought to extend their own dignity and power. But in this State there are no such personal privileges, unless we esteem as such, the right of a defendant to be sued only in his own county, or in the county where the plaintiff resides, if found therein. Such pleas usually relate to the jurisdiction of the court over the subject matter of the suit; the want of which cannot be remedied by consent—is fatal in any stage of the proceedings—and which the court, of its own mere motion, is bound to notice. If, then, there exists no reason why the pleas in this case should have been signed by the party himself, they were, in every other respect, formal and regular; and it was error in the court below to strike them out. Nor did the plaintiff in error waive his pleas to the jurisdiction when he pleaded to the action, as it might have been claimed he had done, if he had answered over after they had been adjudged ill, on demurrer, or the facts found against him.

The third assignment of errors is, that the court erred in overruling the motion of the defendant below to instruct the jury that, under the issues joined in this case, they should find for the plaintiff or defendant as the case might be, separately upon each issue; and in instructing the jury that they might find for the plaintiff or defendant, upon both issues in one finding. The state of the pleadings was that the defendant below had suffered judgment upon *nil dicit* upon the second count, and pleaded payment as to the first and third counts.

According to all authority, in the rules of pleading and practice, in

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a case, where the aggregate amount in the declaration has been severed by failure to plead as to one count, where there are three separate and distinct causes of action joined together, and where there are separate issues, upon two distinct counts, the jury must find, as they were sworn to do in this case upon the issues, that is to say, upon each issue, else there is no propriety in the rules of pleading.

And, upon the whole record, it appears that the court below persisted in entertaining jurisdiction of two sums in controversy, which are not within its jurisdiction.

FOWLER, *Contra*:

Dillard's demurrer was properly overruled. The objections made to the declaration, if well founded—which is utterly denied—could only be taken advantage of by plea to the jurisdiction, or in abatement. Our Circuit Courts are not of inferior and limited jurisdiction, but are superior courts, and have general common law jurisdiction. Therefore it was wholly unnecessary to aver that the parties were residents, &c., but if defendant was not subject to be sued, or the plaintiff not competent to sue, Dillard was bound to show it by plea; which he failed to do.

The amount of each writing obligatory declared on, or the aggregate, amount fixes the jurisdiction of the court as to the amount; and jurisdiction thus acquired, cannot be taken away by proving that a part of the demand had been paid. So that this pretended objection could neither be reached by demurrer or by plea. Each count averred a sum in controversy of more than one hundred dollars.

Pleas to the jurisdiction were properly stricken out, because Dillard had waived his right to file such pleas by his two successive prayers of oyer, and his general demurrer, all and each of which admitted the jurisdiction of the court. If a defendant pleads to the jurisdiction of the court, he must do it *instantly*, on his appearance, for if he impairs he owns the jurisdiction of the court. 4 *Bac. Abr.* 28, 35, 36, title *Pleas and Pleading*; *Dyer* 210; *Cro. Car.* 9; *Lord Raym.* 34; 6 *Mod.* 146; 1 *Tidd's Pr.* 418; *Latch*, 83.

Two prayers of oyer and one demurrer, certainly make an *appearance*; at any rate, as much or more so than an *imparlance*, which is

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simply a request for time to plead. The credits endorsed on the notes are no part of the record. They were not legitimately granted on oyer, so as to form a part of the record; and if given in evidence, they are not put on the record by bill of exceptions. Consequently, no notice can be taken of them. 1 *Tidd* 572; *Co. Lit.* 303; 1 *Tidd* 586.

Even if the pleas to the jurisdiction were not properly stricken out, as Dillard pleaded over, he waived thereby an advantage which such striking out might otherwise have given. 1 *Tidd's Pr.* 572.

The court properly refused to instruct the jury that they must find the issues separately; and with equal propriety instructed them that they might find generally. The law is, that on a declaration, consisting of several counts, or of a single count, and several issues, that the jury may find generally or separately, at their option or discretion. 2 *Tidd's Pr.* 801, *et seq.*; *Rev. St.* 635, *et seq.*

Further. Plea to jurisdiction was stricken out properly, because it was not filed within the first four days of the term. 1 *Tidd's Pr.* 422, 585; 1 *Str.* 523; 4 *T. R.* 520; 6 *T. R.* 369; 7 *T. R.* 447; 1 *T. R.* 227; 5 *T. R.* 210; 2 *Str.* 1192, 1268; 1 *Wils. Rep.* 23, *Long vs. Miller.*

Ringo, Chief Justice, delivered the opinion of the Court:

That all of the courts of this State derive the whole of their jurisdiction from the Constitution, and statutes passed in conformity with the provisions thereof, is a proposition which, in our judgment cannot be denied, for they are all created, or their creation specially provided for by the Constitution; and their respective jurisdiction is, in many respects, expressly defined and limited by the same instrument; yet, in some respects, it is subjected to the control of the Legislature, and may be, from time to time, distributed by statute, according to the will of that department, among the several judicial tribunals, not prohibited by the Constitution from taking cognizance thereof. In regard to matters of contract, the jurisdiction of the Justices of the Peace, is definitely and definitely prescribed by the Constitution, so far as it depends upon the sum in controversy, and in this respect the power of the Legislature over the subject is confined or restricted: as

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likewise it is in regard to the jurisdiction of the Circuit Court, except that the latter is not made *exclusive*, and therefore it is competent for the Legislature to vest in other judicial tribunals, a jurisdiction concurrent with that of the Circuit Court, over all matters of contract of which it has cognizance: although it is not within the power of that department to divest the Circuit Courts of their original jurisdiction conferred upon them by the Constitution in "matters of contract where the sum in controversy is over one hundred dollars," or in any manner restrict or prohibit their exercise thereof, so far as it depends upon the sum in controversy. On this subject the language of the Constitution is that the Circuit Court shall have "original jurisdiction of all civil cases which shall not be cognizable before the Justices of the Peace, until otherwise directed by the General Assembly: and original jurisdiction in all matters of contract, where the sum in controversy is over one hundred dollars," and that Justices of the Peace, "shall have individually, or two or more of them jointly, *exclusive* original jurisdiction in all matters of contract, except in actions of covenant, when the sum in controversy is of one hundred dollars and under." This language comprehends every description of contract, and gives to the Circuit Courts or Justices of the Peace jurisdiction over them, and leaves their respective jurisdiction to be determined solely by the sum in controversy; and therefore it is that each Circuit Court is alike vested with original jurisdiction in every matter of contract where the sum in controversy exceeds one hundred dollars, and no valid law can be passed by the Legislature prohibiting its exercise; and every Justice of the Peace is in like manner vested with *exclusive* original jurisdiction in every matter of contract, (except in actions of covenant,) where the sum in controversy does not exceed one hundred dollars. But before such jurisdiction can be exercised, every party to the contract, whose rights in respect thereof, are to be adjudicated, must be legally before the court, or at least be legally notified of the proceeding, and have an opportunity of contesting the demand of his adversary, and vindicating his own right according to law, and therefore, unless the defendant voluntarily enters his appearance to the action, or is found and legally served with such process or notice as is required by law in such case, within the territorial juris-

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diction of the court or Justice of the Peace, or such other place as the law authorizes such service to be made, the jurisdiction so conferred by the Constitution on the Circuit Court and Justices of the Peace cannot be exercised. But upon such appearance being entered, or such process or notice served on the defendant, the court or Justice of the Peace thereby acquires jurisdiction of the person of the defendant, and may lawfully take cognizance of and adjudicate the case, without any regard to the residence of the parties, or either of them; because the jurisdiction of the court, in such cases, depends entirely upon the sum in controversy, and neither does or can be made to depend upon the residence of the parties. And if the right of a party to sue, can be restricted by statute to the county or township where the defendant resides, or where the plaintiff resides, and the defendant may be found, it must in our opinion, upon the same principle, be also conceded, that the Legislature possesses the power of prohibiting suits from being brought in the Circuit Court of more than one county in the State—a power which, if so exercised, would effectually take from every other Circuit Court the whole of their jurisdiction in civil cases, and vest it in a single court, contrary to the express letter, as well as the obvious design of the Constitution. We are therefore of opinion that so much of the 4th section of the 116th chapter of the Revised Statutes of this State, as enacts that suits instituted either by summons or *capias* “shall be brought, when the defendant is a resident of this State, either in the county in which the defendant resides, or in the county in which the plaintiff resides, and the defendant may be found,” so far as it restricts the right to sue upon matters of contract in any of the Circuit Courts of this State, when the sum in controversy is over one hundred dollars, is in conflict with, and repugnant to the Constitution of this State and void, and that in suits instituted in said courts on any contract, no averment as to the residence of either party is necessary to give the court jurisdiction of the case, or for any other purpose whatever.

In regard to the other defects or imperfections specially expressed in the demurrer, it is deemed sufficient to remark that each count in the declaration discloses a contract for a sum exceeding one hundred dollars, and therefore within the jurisdiction of the court; and the fact that it appears from the oyer granted that the several obligations upon

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which the first and third counts are founded, are respectively endorsed with a credit, sufficient to reduce the amount due thereon to a sum less than \$100 does not, in our opinion, constitute an objection of which the defendant can avail himself on demurrer to the declaration, because the demurrer expressly admits the jurisdiction of the court, and the declaration in each count thereof, declares in legal form on a good cause of action against the defendant, which is apparently within its jurisdiction; and although the obligation set out, on oyer thereof being given, enters into and forms a part of the declaration, the credits thereon endorsed do not, because they are no part of the contract upon which the suit is founded, and do not change or qualify the legal rights of the parties to it, otherwise than as a payment of so much of the debt, of which the endorsement is but evidence of the same grade as a receipt, which is not otherwise connected with the original contract, but may be explained or controverted by the plaintiff; and therefore the amount of the defendant's legal liability upon the contract, as set out in the declaration, and shown upon oyer, exclusive of interest, must, in regard to the question of jurisdiction attempted to be raised upon the demurrer, be considered as the sum in controversy; although it was competent for the defendant, if he thought proper to have done so, to have shown the facts by a special plea in abatement, to the jurisdiction of the court, before he had interposed any defence admitting the jurisdiction thereof, and thereby have raised and presented a distinct issue as to the sum really in controversy, the finding upon which would have determined the question of jurisdiction; and according to the principle established by this court in the case of *Heilman vs. Martin*, decided at the last term, this is the only means by which the want of jurisdiction can be shown, when the contract, as set out in the declaration, is within the jurisdiction of the court. We are therefore of the opinion that the declaration is sufficient, and that the demurrer thereto was rightly overruled.

The pleas to the jurisdiction of the court were not filed until after the demurrer was disposed of, which is too late, as has been repeatedly held by this court, and for this reason they were properly struck out of the case.

The third error assigned questions the opinion and judgment of the

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court in refusing to instruct the jury as asked by the defendant, as well as in the instructions given. As a general rule, it is unquestionably true, that the finding of the jury must embrace all the issues joined, and be responsive thereto. But when all of the issues are, as in this case, essentially the same, and such as may be distinctly and fully responded to by a general verdict for either party, we are not aware of any principle of law which requires a separate finding as to each issue, and in such case we have not been able to discover what benefit either party could derive therefrom, and therefore, in our opinion, the court did not err in refusing to give the instruction asked, nor in the instruction given. The judgment is therefore affirmed.

RICHARD H. YEATES against ELIJAH HEARD.**ERROR to Phillips Circuit Court.**

A motion to dismiss is waived by a subsequent demurrer which presents the same point.

That no copy of the instrument sued on, separate from the copy set out in the petition, was filed, in the statutory proceeding, is no ground of demurrer.

In suit by petition in debt, where the instrument sued on is signed by an abbreviated name, it is not necessary to aver that the person sued is the same who signed it.

Heard sued Yeates by petition in debt. Yeates moved to dismiss the suit on the ground that there was no copy of the writing sued on, filed with the petition as required by statute, but the motion was overruled by the court. He then demurred, setting out as causes of demurrer, that there was no copy of the instrument sued on filed with the petition; and, that it did not appear that Richard H. Yeates, who was summoned to answer, and the R. H. Yeates, who appeared to have executed the writing were one and the same person; which demurrer was overruled; to which decision of the court, the defendant filed his bill of exceptions; and final judgment was given by *nil dicit*.

PIKE, for plaintiff in error:

The question is, whether, in a suit by petition and summons, it is necessary to file a copy of the instrument sued on, separate from the copy contained in the body of the petition; and if it be, whether a failure to do so operates a dismissal, on motion? It is a question exclusively governed by the statute.

The 6th section of chap. xxi of the Revised Statutes, page 133, *all* seems to us to leave no doubt on the first point. It provides that in suits instituted under the provisions of that chapter, the petition signed by the plaintiff or his attorney, together with a true copy of the instrument sued upon, and the assignments thereon, if any, *shall* be filed in the office, &c. The petition *includes* a copy; and of course the

Yeates against Heard.

expression "the petition signed, &c., and a true copy," means a copy separate from the petition.

If the copy is required to be filed, and certainly, that it is must be admitted, how can the failure to file it be taken advantage of? The statute does not provide; but it would seem that the same course would be pursued as though no petition had been filed; that is, a motion to dismiss. The whole question depends on the statutes, and needs no argument.

ASHLEY & WATKINS, *Contra*:

The record shows that after Yeates had excepted to the opinion of the court below, overruling his motion to dismiss, he entered his demurrer to the petition, and by consent, stated the causes of demurrer on the record.

According to the rules of pleading, this demurrer answers to the action, and it is a waiver of the previous exception taken to the opinion of the court overruling his motion to dismiss. The demurrer was also overruled, but as the overruling of the demurrer is not alleged to be erroneous, there seems to be no question whatever for the consideration of the court.

However, the first ground specially set down for demurrer is the same ground as that taken in the motion to dismiss, namely, that a copy of the instrument sued on had not been filed, together with the petition, &c. We insist that this is neither good ground for demurrer, nor of motion to dismiss, but a motion to dismiss is certainly the appropriate mode of raising such an objection, and the defendant below had already made such a motion and abandoned it.

The second cause of demurrer set down is, "that it does not appear from the petition that Richard H. Yeates who is summoned to answer, and the R. H. Yeates, who executed said bond to plaintiff, are one and the same person," which ground of demurrer was also overruled, and the decision is fully sustained by the opinion of this court in the cases of *Webb vs. Prescott and Jones*; and *Dudley vs. Smith and Graves*, from Chicot county, delivered during the present term.

DICKINSON, *Judge*, delivered the opinion of the court:

As to the first objection, the plaintiff in error having in his demurrer made the objection to the proceedings, if there was any thing in his motion, he waived it by demurring; and the only question is upon the demurrer.

The petition conforms strictly to the form prescribed in the statute, not only in setting out a copy of the instrument sued upon, but in every other respect; and the other objection, that it does not appear that Richard H. Yeates is the same person who executed the obligation, bearing the signature of R. H. Yeates, we cannot consider as a substantial legal objection; and we so expressly decided in the case of *Webb vs. Jones and Prescott*, at the present term of this court, when the same question was raised. We consider the petition sufficient for the plaintiff to maintain his action, and that the demurrer was rightly overruled. The judgment is therefore affirmed.

WILLIAM M. BOSTWICK against HENRY W. FLEMMING.**ERROR to Phillips Circuit Court.**

In the proceeding by petition and summons, it is unnecessary to file any copy of the instrument sued on, other than that contained in the body of the petition.

This was a proceeding by petition and summons. The defendant below moved to dismiss the suit on the ground that there was no copy of the note filed with the petition as required by the statute. The motion was overruled, and there being no further defence, judgment was accordingly entered in favor of the plaintiff.

PIKE, for plaintiff in error, offered the same argument as in the case last preceding.

ASHLEY & WATKINS, Contra:

The only question presented in this case is, upon the motion of the defendant in the court below, to dismiss the case upon the ground that the plaintiff below had not filed a copy of the instrument sued on; which motion being overruled, the defendant excepted, and said nothing further—suffered judgment.

The whole scope and object of the law of petition in debt seems to be to afford an easy and simple remedy upon bonds, bills, and notes, and upon the same principle to allow the defendant to make any defence he may have to the merits without the forms of pleading.

The only imperative requisition of the statute is that the plaintiff shall file a true copy of the instrument sued on, with the assignments thereon, if any, which of itself imports a title in the plaintiff to sue, and an obligation on the part of the defendant to pay, and dispenses with the usual averments of that kind in a declaration at length.

What then is meant by the copy of the instrument sued on? By reference to the second section of the act, *Rev. Stat. p. 152*, it will be seen that the plaintiff is required to insert a copy of the instrument sued

on, in the body of his petition. So in the third section it is provided that if the plaintiff be the owner of a bond or instrument sued on, as assignee, the fact of the assignment shall be stated in the petition, and the statement thereof may be in the following form, *to be stated immediately* after the copy of the bond, bill, note, &c., inserting the assignments.

Now it is not probable the law means that the plaintiff shall file two copies of the instrument sued on.

On the contrary, I understand the object and intention of the law to be that the copy of the instrument sued on, with the assignments, if any, is the whole sum and substance of the plaintiff's declaration, and the plaintiff must set out a true copy at his peril, otherwise the defendant may require him to produce the original, and he will be nonsuited.

In this case, the defendant below did not avail himself of this right, if the instrument were not set out truly, but objected on the ground that a *copy* had not been filed, evidently a mere play upon words, and evasion of the statute, because it appears from the record, that the plaintiff below had set out in his petition a true copy of the instrument with the assignment thereof; and, if the plaintiff in error would have it so, the petition, together with such true copy, had been filed in the office of the Clerk.

DICKINSON, *Judge*, delivered the opinion of the court:

The only question presented for our consideration is whether a copy of the instrument sued on must, in addition to the copy set out in the petition, be filed in the Clerk's office at the time of the commencement of the suit. By reference to the statute authorizing the mode of proceeding by petition and summons, the plaintiff is required to "insert a copy of the instrument sued on." The 6th section of the act referred to, declares that "in all suits instituted under the provisions of this act, the petition signed by the plaintiff or his attorney, together with a true copy of the instrument sued on, and the assignments thereon, if any, shall be filed in the office of the Clerk of the Circuit Court." In the case before us, the petition was signed by the attorney of the plaintiff, and contains a true copy of the instrument sued on, and filed

Bostwick against Flemming.

in the office of the Clerk of the Circuit Court of Phillips county, as required by said 6th section. Under the present law regulating the form of proceeding in prosecuting actions, the declaration or petition is filed in the Clerk's office before the writ is issued, and does not go out with the writ, but remains on the files of the court, subject to the inspection of the party. It is clear, in our opinion, that this is all the statute contemplates or requires, for it would be absurd to suppose that the Legislature required that two copies of the instrument sued on should be filed in the same office, and at the same time, nor is it in our opinion necessary. The proceedings are in strict conformity with the statute, and the Circuit Court rightly overruled the motion to dismiss. The judgment of the court below must therefore be affirmed with costs.

The same decision was made in the case of **WILLIAM M. MCPHERSON** against **HENRY L. BISCOE**, assignee, &c., in error to the same court.

DE LA F. ROYSDON *against* JOHN SUMNER.

ERROR to Chicot Circuit Court.

In declaring upon a covenant, it is not necessary to set out the exact words of the agreement, but only to state its legal effect, according to its true meaning and intention.

Whenever a covenant is in its terms defective, it ought to be set out according to its legal consequences.

Where a client covenanted with an attorney that he would pay him a certain sum in case he (the client) should gain a certain suit, in which he had employed the attorney, the declaration on the covenant properly stated the covenant to be that the client would pay that sum in case the attorney gained the suit; and an averment that the attorney did gain the suit for his client, is a sufficient averment of the condition precedent to the payment.

This was an action of covenant, upon certain articles of agreement, by which Sumner agreed and covenanted, that whereas he had employed Roysdon, as an attorney, to defend him in the case of Wm. L. Baldwin against him, brought in Chicot Circuit Court, for a certain negro girl Lizza, purchased by him of James Gray; "in which case I am to pay him, the said Roysdon, the sum of one hundred and fifty dollars, *if I gain the said suit,*" &c.

The declaration avers that Sumner by his covenant, covenanted to pay Roysdon the sum of \$150, "*provided said plaintiff gained a suit in which said defendant employed said plaintiff as an attorney,*" &c., describing the suit as in the covenant. And the declaration avers, that said Roysdon *gained said suit or case* for said Sumner, as said Sumner employed him to do, and that he is entitled to said sum, as will appear by reference to said agreement, and the records of said court in the case, which is, and has been long determined, and which sum has been long since due.

After oyer, the defendant demurred, for variance, on the ground that the covenant showed that the money was to be paid in case *Sumner* gained the suit; and the declaration stated that it was in case *Roysdon* gained the suit; and that the declaration only averred that *Roysdon*, not *Sumner*, gained the suit. The court below sustained the demurrer, and rendered final judgment against the plaintiff.

Roysdon against Sumner.

PIKE, for plaintiff in error:

In suing upon a covenant, it is only necessary to state it according to its legal effect, and it is never necessary to set out the covenant in its exact words. *Grannis vs. Clark*, 8 Cow. 36; and whenever a contract in its terms is defective, it *should* be out according to its legal effect. *Osborne vs. Lawrence*, 9 Wend. 135; 1 Ch. Pl. 302, 303.

In *Lunt vs. Padelford*, 10 Mass. 230, the declaration stated that a writ of execution, in favor of the plaintiff, against one Barney, was in the hands of the Sheriff, which Barney could not satisfy, and that Padelford, by his note in writing promised the plaintiffs that if they would delay the execution, Barney should at a certain day pay or surrender himself, and that if he did not, he Padelford would pay it.

The written contract stated the execution, &c., and that Padelford promised (without saying to whom) that "if said execution could be delayed," &c. The court held that this proof sustained the declaration. *Bristow vs. Wright*, Douglas, 667; *Thursby vs. Plant*, 1 Sand. 235, c. n. 9.

This principle is so perfectly well settled, that it requires no long quotation of authorities to establish or prove it. If, therefore, the plaintiff, in declaring upon a covenant, states any part of it, not in the words of the covenant, but in any other words or manner which in law or in the common acceptance of language, amount to the same thing, it is sufficient. Thus if the covenant is that A. will pay by his agent, it is sufficient to state a covenant that A. himself will pay.

In this case there is a condition precedent fixed by the covenant, and to be stated in the declaration. That condition precedent is, if the covenantor, client of the covenantee, should gain a certain suit. The declaration states the condition precedent to be, if the covenantee, being the attorney of the covenantor, should gain the suit; and avers that he did gain it for the covenantor.

Now what is the legal effect of the condition precedent in the covenant. "If Sumner should gain the suit," is the expression. Is that all which is meant by, or included in it? The amount to be paid Roysdon was a fee. Was he to receive that fee if Sumner gained the suit, whether he attended to the case or not? Was he to receive it if he failed to attend to the case, and Sumner gained it

Roysdon against Sumner.

by employing another attorney? Unquestionably not. The expression therefore means, and such is its legal effect, and none else, that Sumner would pay the fee, if, by Roysdon's attention to the case, he Sumner should gain it—in other words, if Roysdon should gain it for him. Suppose the averment of performance of the condition precedent, had merely been, that Sumner did gain the suit? Would it have been sufficient? We do not believe that it would. The condition precedent here involved something to be done, some service to be rendered by Roysdon to Sumner. A benefit to Sumner was provided for, to be sure—but a *benefit* to arise out of Roysdon's acts and services. If such an averment of performance would be good, without stating any act to have been done by Roysdon at all—merely stating the benefit to Sumner, but not the agency of Roysdon in working that benefit, we are mistaken. And if it would be good, still, beyond a doubt, Sumner could reply that, true he gained the suit, but without Roysdon's assistance, and by employing other counsel.

It is perfectly manifest, therefore, that, in order to state the condition precedent according to its legal effect, the rules of correct pleading required Roysdon to state, not only that the suit was to be gained, but that it was to be gained by his exertions and services: in other words, that *he* was to gain the suit for Sumner: and in averring a performance of the same condition, it was absolutely necessary to aver, what is here averred; that *he* gained the suit for Sumner.

The court below said that there might be a vast difference between the gaining of the suit by Roysdon, and the gaining of it by Sumner. Certainly, for Sumner might gain it without Roysdon's aid—whereas as the declaration and covenant both show, Roysdon had no interest in the suit as a party, and therefore could not gain it, without gaining it for Sumner. The very reason, therefore, assigned by the court for sustaining the demurrer, should have induced a decision diametrically opposite. The declaration being undoubtedly good, the demurrer should have been overruled.

TRAPNALL & COCKE, *Contra*:

Roydson against Sumner.

DICKINSON, *Judge*, delivered the opinion of the court:

In declaring upon a covenant, it is not necessary to set out the exact words of the agreement, but only to state its legal effect according to its true meaning and intention. Whenever a covenant is in its terms defective, it ought to be set out according to its legal consequences. *Grannis vs. Clark*, 8 Cowen 35; *Osborne vs. Lawrence*, 9 Wend. 135; 1 Ch. Pl. 302-3; *Lunt vs. Padelford*, 10 Mass. Rep. 320; *Gaster vs. Ashley*, 1 Ark. 325. The principle is so well settled that it is unnecessary to say any thing further in defence of it. The breaches are properly assigned in the declaration, for they aver the only facts upon which the defendant's liability accrued. The covenant contains two conditions. The one was precedent upon the other. The plaintiff was employed as attorney to attend to a suit in which the defendant was interested, and he was to receive one hundred and fifty dollars provided the defendant succeeded in the action.

The reception of his fee was made to depend upon a condition precedent, which was, that he would, with due care and diligence, attend to the suit as such attorney. This fact he has averred, and then adds, that he has gained the suit for the defendant. He had no interest in the suit, except the interest of his client as an attorney, and the allegation that he gained the suit for the defendant, is equivalent to averring that the defendant gained it. For this declaration shows that he gained it not for himself, but for the defendant; and therefore, the defendant's liability to pay him one hundred and fifty dollars became fixed by the performance of this precedent condition.

The judgment of the court below must therefore be reversed, with costs.

MAPES, RYAN, & Co., *against* NEWMAN AND POLLOCK.ERROR to *Franklin Circuit Court.*

Where a petition in debt states the instrument sued on, to be a writing obligatory, a demurrer admits this averment to be true.

If two persons sign with one seal, they are held both to have sealed the instrument. An averment that two defendants executed and sealed an instrument, signed thus, "*J. H. Newman and P. Pollock,*" so far from showing them to be partners, expressly disproves the fact.

This was a suit by petition and summons, brought against Newman and Presley Pollock. Service was had on Newman alone. At the return term, Newman demurred to the petition, for variance between the writ and petition, and because the writing was described as a writing obligatory, when it was a promissory note, and as the bond of John H. Newman and Presley Pollock, under the style of "John H. Newman and P. Pollock," showing each other partners, and that partners cannot bind each other under seal without special authority to do so. The demurrer was sustained.

The petition stated that the plaintiffs were the legal owners of a writing obligatory, (sometimes called a bill,) against the defendants John H. Newman and Presley Pollock, executed by the said Newman and Pollock, by the style and description of John H. Newman, P. Pollock, to the following effect:

\$747 92.

NAPOLÉON, Mo. ARKANSAS,

10 June, 1827.

One day after date, for value received, we promise to pay to Mapes, Ryan, & Co.; or order, seven hundred and fifty-seven dollars and ninety-two cents. John H. Newman, P. Pollock, [seal.]

PIKE, for plaintiff in error :

The question is, whether the demurrer was properly sustained. Let us examine each ground of demurrer.

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First: Variance between the writ and petition. This can be no ground of demurrer. A demurrer is a plea to the action. There never was any method of taking advantage of such a variance except by plea in abatement, and then only after oyer of the writ. Certainly it was never before imagined that any such variance could be taken advantage of by demurrer, which is an appearance to the action.

Second: That the writing is described as a writing obligatory, when it is a promissory note.

When this writing was executed, a scrawl, without any words in the body of the instrument, such as "in witness whereof," &c., made a sealed instrument. It is also a well settled principle that where two persons sign an instrument, but with only one seal, it is a sealed instrument as to both.

The petition states this instrument to have been executed by both Newman and Pollock—and the names of both are prefixed to the seal. The demurrer admits the averment that they both executed it, to be true—and if both signed it, it is the sealed instrument of both.

The demurrer also states that the petition shows the writing to have been signed by Newman and Pollock, by their style and description of "John H. Newman, P. Pollock," showing them partners. There is no averment that they are partners, nor can the petition be construed to mean any thing of the kind. The averments of the petition are that *both* executed it—and the phrase, "by their style and description" is merely intended to show in what manner each signed his name. Had it been "*by their respective styles and descriptions*," it would have been better, but that is manifestly its meaning.

There being nothing in the petition showing that they were partners, if the persons signing with but one seal, are both held to have sealed the instrument, the petition is every way sufficient. That such is the law, see *Hurlstone on Bonds* 7; *Shep. Touch.* 55; *Com. Dig. Fait, (A.)* 2; *Ball vs. Dunsterville*, 4 T. R. 313; *Elliott vs. Davis*, 2 Bos. and Pul. 338.

DICKINSON, Judge, delivered the opinion of the court:

At the time the instrument was executed, a scrawl, without any words in the body of it, was sufficient to make it a valid instrument. The de-

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murrer admits the facts to be true, as set out in the petition. The averment is that it was a writing obligatory, and of course a sealed instrument. It was sealed as to both of the obligors, although there was but one scrawl attached to it. By signing it and placing after both their names one seal, it became valid as to both, to all intents and purposes. And so the petition alleges it to be, and the writ corresponds with the allegation.

If two persons sign with one seal, both are held to have sealed the instrument. The petition is, therefore, every way sufficient; and this position is fully sustained in *Hurlstone on Bonds* 7; *Shep. Touch.* 55; *Com. Dig. Fait (A.)* 2; *Ball vs. Dunsterville*, 4 T. R. 313; *Elliott vs. Davis*, 2 Bos. and Pul. 338. It is said the defendants were partners, and therefore, they had no right to bind each other by a sealed instrument. There is no averment in the petition that they are partners. The statement that they executed it by the style and description of J. H. Newman and P. Pollock, so far from showing them to be partners, expressly disproves that fact. The court below therefore erred in sustaining the demurrer, and its judgment must be reversed with costs.

DANIEL McDONALD *against* JACOB FAULKNER.

ERROR to Pulaski Circuit Court.

To entitle a party to a credit under the plea of non-assumpsit, he must prove; *first*, a payment in money or its equivalent; *second*, that it was accepted; and, *third*, its application to the particular debt.

Payment can, in numerous instances, be given in evidence under the plea of non-assumpsit. The plaintiff can recover no more than he is justly entitled to, in equity and conscience; which is no more than what remains after deducting all just allowances which the defendant has a right to retain in his hands.

Where the defendant's account, including money payments and other charges, was presented to the plaintiff, who examined it, made some corrections, and then assented to its correctness, and agreed that it should be taken and considered as a credit and payment against and upon his own account, this is such a plea as can be given in evidence under the plea of non-assumpsit.

Very slight evidence of acquiescence will show assent to any particular mode of payment.

Courts have, uniformly, where justice and circumstances required it, indulged the parties in preparing bills of exceptions.

It is an indulgence often allowed to parties, and sometimes necessary, where great labor is required in the preparation of their cases. Nine days after overruling a motion for a new trial, is not so unreasonable as to create a doubt of the truth of the statements in the bill of exceptions.

The cases of *Gray vs. Nations* and *Lenox vs. Pike and wife*, do not conflict with this doctrine.

And when it appears that the exceptions were taken at the trial, and on overruling the motion for a new trial, and subsequently reduced to writing and signed and sealed by the court, they became a part of the record.

Where the record states that upon the overruling of the motion for a new trial, the defendant excepted, and placed his exceptions upon the record, and the bill of exceptions, signed nine days afterward, states that the exceptions were taken when the motion for a new trial was overruled: the fact that they were taken at that time cannot be controverted.

And where, in such case, the plaintiff had *his* bill of exceptions signed by the bystanders, objecting to the defendant's bill after such a lapse of time; and in it admits that the instructions and evidence on which the defendant's bill was based, were a part of the proceedings at the trial, he is estopped from denying such instructions and evidence to have been given and adduced on the trial.

This was an action of indebitatus assumpsit, brought by Faulkner against McDonald, and a bill of particulars was filed when the suit was commenced. At September term, 1839, McDonald pleaded non-assumpsit. The record shows this plea to have been filed, and issue joined on the 10th of September, and that on the same day the issue was tried by a jury, who found for Faulkner one hundred and

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twenty-seven dollars damages, for which, with costs, judgment was entered the same day. This is all the record of that day.

On the 12th of September the record states that McDonald filed his motion for a new trial. The motion for a new trial is copied in the transcript, and is based on two grounds; "*first*, that the instruction of the court, excluding a part of the evidence of defendants, was erroneous;" *second*, that the verdict was contrary to law and evidence.

On the 16th of September the record states that the court on that day overruled the motion for a new trial, "and thereupon the said defendant, by his counsel, excepted to the opinion of the court, and asked and obtained leave to prepare said bill of exceptions, and also a statement of the testimony in this case."

On the 21st of September, the record states that on that day "the defendant filed his bill of exceptions, whereupon the plaintiff filed his bill of exceptions, certified by the bystanders."

The defendant's bill of exceptions appears in the transcript, signed and sealed by the Circuit Judge, and dated September 20th. It states that on that day the defendant moved for a new trial, and sets out the ground of the motion, as stated above; that the motion was overruled, "to which opinion of the court the defendant excepts, and pray his exceptions, with the following, which was all the evidence in the case, may be signed, sealed, and enrolled." Then follows the statement of the evidence, which is, that the plaintiff proved his account, amounting to \$200: that the defendant then produced and proved an account against the plaintiff to be just and correct, it being in part for money, and in part for various other items: that the plaintiff had examined the defendant's account, and after making some corrections, had admitted it to be correct, and that it was agreed between plaintiff and defendant, that the defendant's account was to go as a payment and credit upon the account of the plaintiff: and the bill of exceptions then stated, that the court, on motion of the plaintiff, against the consent of the defendant, instructed the jury, that only so much of defendant's account as purported to be money payments should go in evidence as payments, and that the residue should be excluded.

The plaintiff's bill of exceptions stated that on the 20th of Septem-

ber the defendant tendered to the court a paper purporting to be a bill of exceptions to the opinion of the court overruling his motion for a new trial, "and also a statement of the evidence of this cause, and of the instruction of the court upon the trial thereof," whereas no minutes or memoranda in writing of such evidence or instruction had been taken at the trial, or at any time had been preserved, either by the court or the parties: that on the 21st of September the paper so offered was signed by the Judge, and ordered to be filed, to which signing and filing of said paper the plaintiff excepts.

To this bill of exceptions the Judge appended his statement, that he declined signing it, "not that it does not contain the facts of the case, but because it purports to be an exception to the opinion of the court in signing a bill of exceptions taken to a former decision of the court in signing a bill of exceptions in the progress of this cause." Thereupon the plaintiff's bill of exceptions was signed and certified to be true by five bystanders.

TRAPNALL & COCKE, for plaintiff in error:

We admit that under our statute a mere set off cannot be given in evidence under the general issue unless notice be given at the time of filing the plea, of the demand intended to be insisted upon, and upon what account the same became due. It is equally true however, that payment, or whatever amounts to a payment, can be given in evidence under that issue, and although as a general rule payment must be made in money; yet whenever any thing else has been received as payment, it will be regarded by the court as such, and treated accordingly. A payment must be in money, or its equivalent, promissory notes may be a good payment if they are accepted as such. *Harlan vs. Wingate, administrator*, 2 J. J. Marshal, 138. The case of *Whittington vs. Roberts*, 4 Monroe, 173, is directly in point. There the complainant exhibited his bill to be relieved against a judgment at law founded on a note executed by him to Francis Jones, who assigned it to Whittington, alleging that after he had given the note, and after it was due to Jones, he sold Jones a negro slave, and it was agreed at the time of sale between him and Jones that the amount of the note should be discounted out of the price of the slave, but the note

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not being present he did not take it up. Jones afterwards lost the note by gaming to Whittington, to whom he assigned it, Whittington brought suit upon it before the Justice of the Peace. Complainant proved the agreement to discount the note with Jones, and the Justice gave judgment for him from which Whittington appealed. In the Circuit Court judgment, by default, was given for Whittington. Counsel for Whittington contended that the demand was not a direct payment, but rather an award and satisfaction which ought to have been pleaded at law. Upon this position the court remarks that the "objection rests on the inquiry whether this discharge of the note by part of the price of a negro could have been given in evidence under a plea of payment at law. It is true a payment literally means a discharge of the obligation according to its letter. But courts have extended the issue more to the spirit, and have not confined it to the letter. Hence Starkie in his treatise on evidence, vol. 3, p. 1084, lays down the rule that the payment must be made in money or its equivalent. What shall be counted an equivalent may often be a question of some nicety. Bills of exchange, bank notes, or negotiable notes on individuals have been held good proof under the plea of payment. But there must be an agreement to accept them as such. If such articles, with an agreement to accept them as payment, may be given in evidence, certainly a sum of money already in the hands of the payee, and due from him to the payor, might by agreement be discounted as payment. It was certainly unnecessary for the parties to go through the idle ceremony of the payee handing the money to the obligor, and he handing it directly back to discharge their respective obligations. It was competent for them to discharge both by agreeing that the money should remain where it was and no more was necessary in this case." If then it was competent for Roberts, under the plea of payment, to give in evidence the agreement with Jones to discount the note, much more would it be competent for McDonald, in the case before the court, to give in evidence under the plea of non assumpsit, the agreement of Faulkner to accept as payment of his account McDonald's account against him. It is true if there had been no express agreement on the part of the plaintiff to accept the account of the defendant as payment of his own, the defendant could

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not, under our statute, have insisted upon it as a set off, without giving the necessary notice at the time of filing his plea. It was not as a set off that the defendant brought forward his account, but as a payment made by him to the plaintiff, and by the plaintiff expressly accepted as such. In this case, as in the one above quoted, there was "a sum of money already in the hands of Faulkner, and due from him to McDonald, which it was competent for them, by agreement, to discount as payment." The evidence exclusively shows it was so discounted and accepted, and being so accepted, the same legal consequences and effects attach to it as if the payment had been actually made in money; and although the defendant could not have given it in evidence as a set off under the general issue without notice. Yet, as a payment actually made and accepted, it was clearly competent for him to do so. For there is no law or rule of practice which requires notice to be given in order to let in evidence of payment under the general issue. The court therefore manifestly erred in the instructions which they gave to the jury, and by that means withheld from the defendants a credit for a large sum which he had already paid, and which had been accepted as payment by the plaintiff. For these reasons the motion for a new trial ought to have been granted.

ASHLEY & WATKINS, *Contra*:

The case may now be considered in two aspects. One is that according to all reason and authority, (see *Starkie Ev. Tit. New Trial, Exceptions*; and the decision of this court in the case of *Gray vs. Nations*, and *Lenox vs. Pike, et al.*, and the authorities there cited on this point,) the court here will wholly disregard the paper purporting to be the bill of exceptions of the defendant below.

Another view is that even if the plaintiff in error had taken his exceptions at the trial legally and in apt time, his subsequent motion for a new trial was an application to the equitable and sound discretion of the court, and is a waiver of any alleged error in the instructions of the court at the trial.

And the true state of fact in this case is, in accordance with the presumption of law, that a pretended bill of exceptions or statement of the testimony not taken during the progress of the trial, or before the

jury have retired from the bar of the court, but drawn up some eleven days afterwards, without any notes or memoranda being taken at the trial.

But the pretended exceptions in this case were not taken at the trial, and if taken at all, were taken to the opinion of the court overruling his motion for a new trial, which is not properly a ground of exception.

DICKINSON, *Judge*, delivered the opinion of the court:

The only question presented on the part of the plaintiff in error, for our consideration, is as to the correctness of the instructions to the jury, and the decision of the court below, in refusing the new trial. To entitle a party to a credit under the plea of non-assumpsit, the defendant must prove, first, a payment in money, or its equivalent: second, that it was accepted: third, its application to the particular debt. 2 *Starkie*, 594; *Hurlan vs. Wingate's Adm'r*, 2 J. J. *Mirshall*, 138; 3 *Starkie*, 1084. We do not deem it necessary to comment upon the cases to which this plea can be applied; for that payment can in numerous instances be given in evidence under the plea of non assumpsit, there is no doubt; and this principle is fully sustained in the case of *Dale vs. Tollett, Burrows R.* 2221. Where the same plea had been put in, and Lord MANSFIELD in delivering the opinion of the court, said, "the plaintiff could recover no more than he was justly entitled to in equity and conscience, which could be no more than what remains after deducting all just allowances which the defendant has a right to retain in his hands."

Do the facts in this case, as spread upon the record, show that there was a payment of money or its equivalent? So far as regards the money payments, it appears that credit was given to the defendant, and what stronger evidence can be presented or offered, that the residue of the account was equivalent to money, and that it was considered and accepted of as such, than the acknowledgment of Faulkner himself, who, the witness testifies, examined the account, made some corrections therein, and then assented to its correctness, and agreed with the other party that it should be taken and considered as a credit and payment. That it was accepted as such by Faulkner there

can be no question or doubt. Cases in which bills of exchange, bank notes, and negotiable notes on individuals have been held as equivalent to money, where there was an agreement to accept them as such, are numerous.

In general very slight evidence of acquiescence will show assent to any particular mode of payment. From the whole state of the case as presented to us in the plaintiff's bill of exceptions, we are of opinion that the Circuit Court erred in their instructions to the jury, "that only so much of the accounts of the plaintiffs in error should be allowed as purported to be money payments, and that the rest should be excluded as inadmissible."

The defendant in error, after the trial and the plaintiff's exceptions had been allowed, also tendered his bill, which is signed by bystanders, in conformity with the statute, and made a part of the record, protesting against the signing of the defendant's exceptions, upon the ground that "no minutes or memoranda in writing of the evidence or instructions of the court had been taken at the trial, or had at any time been preserved."

The defendant in error contends that the plaintiff's exceptions ought to be disregarded, from the fact of eleven days intervening between the trial and the signing of the exceptions, no note or memoranda having been taken, and that the subsequent motion for a new trial is a waiver of any alleged error in the instructions of the court. It appears from the record that the case was tried on the 10th of Sept., 1839,—on the 12th the motion for a new trial was made—on the 16th the court refused the application—and on the 21st day of the same month the bill of exceptions was signed and allowed. The result of the investigation which we have made upon this objection, leads us to the conclusion that the courts have uniformly, where justice or circumstances required it, indulged the parties in preparing bills of exceptions. To deprive the courts of this discretion, or attempt to limit them in its exercise, where time is necessary or important to enable suitors or the courts to prepare a full and proper statement of facts, would often tend to subvert the purposes of justice, and deprive parties of the means of redress. It is not to be presumed that courts will so far forget the high and solemn obligation under which they are

acting, as to give credence to a state of facts of the truth and correctness of which there are any doubts.

It is an indulgence often allowed to parties, and sometimes necessary, where great labor is required in the preparation of their cases. In the present instance, we do not conceive that the lapse of time intervening between the several steps taken in the progress of this case, after the rendering of the verdict, so unreasonable as to create a doubt of the truth of the statements in the plaintiff's bill of exceptions.

The defendant also insists that the plaintiff's bill of exceptions ought to be excluded, and relies upon the cases of *Gray and Hinkston vs. Nations*, and *Lenox vs. Pike and wife*, and *Smith and wife*, in support of his argument. But neither of these cases, in our opinion, bears him out. In the first, this court rejected that part of the record which purported to contain two bills of exceptions, because there was no evidence that the exceptions were taken during the trial, and they were not filed in the Circuit Court until after an appeal had been allowed, and that court had lost its power and control over the cause. In this case, however, it does affirmatively appear, not only by the record on the part of the plaintiff in error, but also by the defendant's statements, that the plaintiff's exceptions were taken during the trial, and immediately upon the overruling of the defendant's motion for a new trial, and subsequently reduced to writing, and signed and sealed by the court, whereby it became a part of the record.

Nor is the defendant better sustained by the case of *Lenox vs. Pike and wife*, and *Smith and wife*, in which a paper purporting to be a statement of evidence, but not purporting on its face to be a bill of exceptions to any opinion of the court, had been included in the transcript of the record, signed it is true by the Judge, but neither sealed nor ordered to be placed on file or on record, nor was there any agreement of the parties that it should be placed on the record, nor did it appear whether such statement of evidence was a mere memorandum of the Judge's for his own use, or for the information of this court.

From the views entertained of this case, we are clearly of opinion, that the Circuit Court erred in the instructions given to the jury, and for this reason, the defendant's motion for a new trial ought to have been sustained. Judgment reversed.

Whereupon, **ASHLEY & WATKINS**, for the defendant in error, filed the following petition for a rehearing:

The defendant in error in presenting his petition for a rehearing in this case is conscious that he labors under great embarrassment. To seek, by force of argument, to induce the highest judicial tribunal in the land to reverse their own solemn adjudication, is to assume that the court have erred—an implied censure, revolting to that subtle pride of opinion and official station which pervades the breasts of humbler men.

But if it be the lot of humanity to err, it is not the part of wise men to persist in error. In view of those embarrassments, the defendant respectfully and earnestly shows to the court here, the grounds upon which he asks for a rehearing.

Two preliminary questions are presented by the record in this case, which he deems entitled to the serious consideration of this court.

First: Whether, according to the ancient and the later and better received opinions and practice of pleading, payment or any special matter in bar or avoidance of the action ought not to be pleaded specially. On this subject the attention of the court is called to *Stephen on Pleading*, (3d Am. Ed., 1837, p. 158.) *Appendix, note 44, p. 57, p. 60, et seq;* and *Chitty's Plead.* 472. in *Appendix*.

Second: Can the account attempted to be established by McDonald, the defendant below, be construed to be a payment, according to the legal understanding of the term, or does it not show a mutual indebtedness or cross account, contemplated by our statute concerning set off, and as such required to be specially pleaded, or given in evidence under the general issue with notice? *Rev. Stat., title, Set off.*

The defendant in error might also claim that the motion of the defendant in the court below for a new trial was a waiver of any alleged error in the instructions of the court, and was an application to the sound and equitable discretion of the court, the overruling of which is not a ground of error. But on these points the authorities are numerous and contradictory.

The ground on which the petitioner mainly relies for a rehearing,

is that the opinion of the court, however correct on its face, is founded on a mistaken view of the facts, as they appear upon the record, and it establishes a precedent contrary to all authority, and dangerous in practice.

The court, in their opinion, throughout distinctly assume it as true that the bill of exceptions was not signed and filed until eleven days after the trial—that he excepted at the trial and saved the point—whereas no such state of fact appears on the record.

This is, perhaps, the point upon which this whole case must turn. If the exceptions of McDonald were not properly taken, and in apt time, they do not form a part of the record, and are not entitled to that consideration which the court has given them.

The facts, as they appear upon the record, are these: On the 4th of May, 1839, Faulkner filed his declaration, also a bill of particulars of his account, and process was executed on the same day. On the 10th of September the defendant pleaded non-assumpsit, to which issue was joined, and the court rendered judgment for the plaintiff for \$127, damages assessed by the jury. Two days afterwards the defendant filed his motion for a new trial. Four days afterwards, on the sixteenth of September, the court overruled the motion for a new trial, and thereupon, the defendant, by his counsel, excepted, and asked and obtained leave to prepare said bill of exceptions, and also a statement of the testimony in the case. On the 21st day of September, the defendant filed his bill of exceptions, purporting to be filed on that day, and purporting on their face to be an exception to the opinion of the court in overruling his motion for a new trial, and not to any thing which took place at the trial. That such a proceeding, in suffering that paper to be filed, under all the circumstances, was considered as an outrage, is evidenced by the bill of exception of Faulkner, which the court admitted to be true, but refused to sign, and was thereupon signed by bystanders who had witnessed the whole progress of the cause, and who knew that no memoranda or note in writing of any such instructions or testimony had been taken at the trial, or preserved either by the court or the parties.

In a petition for a rehearing it would not, perhaps, be proper to go into a minute examination of all the cases on this subject. Suffice

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it to say that the universal doctrine is, that an exception to the opinion of the court, in admitting or rejecting testimony, must be taken and presented before the jury have retired from the bar of the court; and an exception to the instruction of the court must be taken and presented before the jury return into court with their verdict. In the English practice, when a bill of exceptions does not form a part of the judgment roll, but is afterwards tacked on to it, and much more length and more formality is used in reciting the proceedings, it is allowable to draw up the bill of exceptions in form, and present it to the Judge for his signature, after the trial, but it is indispensable that the matter of exception itself should be reduced to writing at the trial. And the petitioner invites the attention of the court to the following authorities. *Petersdorf Ab. Vol. 9, p. 217, title Exceptions, Bill of;* 2 *Leigh's Nisi Prius, Appendix p. 1513, forms, &c.*; *Stephen on Pleading, 89*; 1 *Saunders on Plead. and Ev. p. 318*; 1 *Starkie Evidence p. 464*; 2 *Tidd's practice, (1 Am. Ed. 1807,) p. 788*; 3 *Black. Com. Chap. 24, p. 393*; *Wright vs. Sharp, Salk. p. 288*; *Jones, et al., vs. the Insurance Co. of North America, 4 Dallas p. 249*; *Morris vs. Buckley, and others, 8 Serg. and Rawle, p. 218*; *Stewart, and another, vs. the Huntington Bank, 11 Serg. and Rawle, p. 270*; *Sykes vs. Ransom, 6 J. R. 279*; *Milberry vs. Collins, 9 J. R. 445*; *Law vs. Merrill, 6 Wend. 268*; *Shepherd and Stows vs. White, 3 Cowen 32*; *Launce vs. Barker, 10 J. R. 312*; *Holloway vs. Holloway, 1 Monroe 131*; *Givens vs. Bradley, 3 Bibb. 195*; *Riggs vs. McIlvain, 3 Mars. 360*; *Davis vs. Burns, et al. Missouri Rep. 264*.

The only solitary case where a different practice was allowed, is the case of *Gordon vs. Ryan, J. J. Marshall, p. 58*, where the court indulged the party until the next term to prepare his bill of exceptions. I have not seen that case, but from the note of it given in *Pirtle's Dig., title Bill of Exceptions*, it seems that the indulgence was granted upon the express ground that the substance of the exceptions had been taken and reduced to writing at the trial.

To suffer a party to come in at any time after the trial and except or draw up a statement of the testimony, would be utterly subversive of the ends of all legal proceedings.

The petitioner does not mean to say that the opposing counsel

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would prepare, or the Judge of the court below certify to an ex-parte and untrue bill of exceptions or statement of evidence, but the irresistible presumption of law is, that they may be and are untrue.

Let any one come into our Circuit Court, in the midst of a three weeks session, criminal, common law and chancery cases all progressing on the same day, and observe the course of proceedings in that court, and he will then be qualified to judge whether the ends of justice will ever be answered by allowing a party to take and prepare his exceptions and an ex-parte statement of testimony eleven days after the trial has elapsed, and when no exception was taken at the trial, nor any note in writing of any such instructions or testimony taken or preserved by any person whatever.

All of which is respectfully submitted.

LACY, J., delivered the opinion of the court on said petition:

The court has carefully examined the grounds taken in the argument for re-hearing, and do not deem them tenable. All the positions assumed in the argument have been fully answered, except one, which we will now proceed to dispose of. It is said that the opinion distinctly assumes the fact, that the bill of exceptions was taken at the trial, although it was not filed or signed until eleven days afterwards. The opinion certainly proceeds upon this assumption, and the record fully warrants the conclusion.

There were two bills taken in the case. The first bill was taken by the defendant, in which he excepted to the opinion of the court overruling his motion for a new trial upon the following grounds: First, that the instructions of the court, excluding part of the evidence of the defendant was erroneous: Second, that the verdict of the jury was contrary to law and evidence. This bill of exceptions sets out the testimony excluded upon the the trial, and the record expressly states "that upon the overruling of the motion for a new trial, the defendant thereupon excepted to the opinion of the court, and placed his opinion upon the record." The Judge has certified under his hand and seal, the evidence to this court, and has declared that the exceptions were taken at the time he overruled the motion for a new trial.

This fact can therefore be neither controverted nor denied, for it is a judicial record which cannot be disputed.

This bill of exceptions was filed on the 20th September, and although it was eleven days after the rendition of the verdict and judgment entered, still it has express reference to the time of the trial, so far as regards the introduction or rejection of the evidence. The fact that the evidence was given at, or on the trial, is fully demonstrated by the plaintiff's bill of exceptions, taken and signed by the bystanders on the 25th of September, in which he controverts the competency of the court to sign a bill of exceptions after the lapse of time spoken of. His bill of exceptions admits that the instructions and evidence upon which they were based were a part of the proceedings upon the trial. Having admitted this fact by his own bill of exceptions, and thereby makes that certain which might be regarded as somewhat doubtful before, he is estopped from saying that the instructions and evidence were not had and given upon the trial of the cause. Besides, the record being a judicial document, and alleging the fact to be so, the truth of it cannot afterwards be put in issue in any manner whatever. The motion for rehearing must therefore be overruled.

SABIN, ADM'R OF BELDING, *against* ROBERT HAMILTON.

APPEAL from Sevier Circuit Court.

An assignment of a covenant, under the Territorial Law, passed no legal interest in the covenant, to the assignee, so as to enable him to sue on it in his own name: but it unquestionably passed the equity.

When a party sues, as executor, &c., there must be a substantial averment in the pleadings, showing that he sues in his representative capacity, and nothing by indentment can be taken to supply the want of such an allegation.

But it is immaterial in what part of the declaration or pleadings, such averment occurs. And therefore, where, in the breach, the declaration alleges that the defendant "has not paid to the intestate in his life-time, nor to the plaintiff *as administrator aforesaid*," this is sufficient.

No precise or technical words are necessary to constitute a covenant, but any words which show the intention of the parties will be sufficient for that purpose.

The inquiry always is, what were the intentions of the parties? And if there be any ambiguity, such construction is always given as will make most strongly against the covenantor.

Where a party to a covenant by which he was bound to do certain acts, upon the performance of which the other party was to become indebted to him in a certain sum, endorses upon it under his seal, that he *certifies* that the agreement has been complied with on his part, and that the other party is therefore indebted to him as provided in the covenant, all of which, in consideration of a certain sum to him in hand paid by a third person, he assigns to such third person; and adds, that the other party to the covenant "will, on sight, pay to such third person" the amount according to contract: such endorsement is a covenant.

And in it are contained three distinct and separate covenants: first, that the covenantor had performed his part of the original covenant; second, that the other party to the original covenant was indebted to him in the amount specified; and third, that said party would pay it on sight.

And in a declaration upon such second covenant, the breach is not sufficient where it is, merely, that the covenant sued on was presented to the other party to the original covenant, and that he refused to pay according to its true meaning and effect.

Absent, RINGO, *Chief Justice*.

This was an action of covenant instituted by Sabin, as administrator of Ludovicus Belding, deceased. Richard C. Byrd, Ludovicus Belding and Jesse Shelton, entered into a contract under seal, by which the latter agreed to furnish and supply the emigrating Choctaw Indians 2200 rations, to be delivered according to the terms of the contract which the parties of the first part had made with the agent of the United States, for supplying those Indians with 360,000 rations. And in consideration of the party, of the second part com-

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plying with his agreement, the parties of the first part bound themselves to pay him the same proportionable price for the rations that they were to receive from the United States; which payment they were not bound to make until the government had paid them for the whole amount of rations they agreed to deliver.

This agreement was specially set out in the declaration by way of inducement to the action; and it was then alleged that upon the back of the original contract was the following endorsement: "I hereby certify that the within agreement is complied with on my part (that is to say) that I have furnished twenty-two thousand rations as agreed within, for which the said Byrd, Belding and Shelton are now indebted to me for the amount of each ration, at the price the government pays said Byrd, Belding and Shelton, or either of them, as per contract; all of which, for and in consideration of the sum of seventeen hundred and fifty dollars, to me in hand well and truly paid by L. Belding, the receipt whereof is hereby acknowledged, I now assign to said Belding all my right and claim to the within agreement, and the said Byrd, Belding and Shelton will, on sight, pay to said Belding, or order, the amount of said rations, according to contract with government. Witness my hand and seal at Little Rock, 6th September, 1833. R. HAMILTON, [seal.]"

Upon this instrument the action was founded.

The breach of covenant alleged in the declaration was, that the contract sued on was presented to Byrd, Belding and Shelton, and they were specially requested to make payment thereof, and that they refused to pay according to its true meaning and effect. Oyer having been prayed and granted, the defendant demurred to the declaration, and his demurrer was sustained—whereupon final judgment was entered.

TRAPNALL & COCKE, for the appellant:

In the first place it is urged in support of the demurrer, that Sabin has shown no title upon the record to maintain this suit, inasmuch as there is no averment that he sues as administrator. In the commencement of the declaration he has described himself as Aaron N. Sabin, administrator, &c., and if there was nothing else on the record to

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show his representative character, we admit this objection would be fatal. But we find in the subsequent part of the declaration he is named as administrator, which is to show his representative character, and to entitle him to maintain this suit as such. And so this court in the case of *Brown vs. Hicks*, 1 *Ark. Rep.* 232, have declared.

But admitting that the plaintiff's right to sue has been sufficiently shown on the record, it is in the next place insisted that the declaration contains no statement of a legal cause of action. This objection is founded upon a manifest misconstruction of the covenant declared on. What is the legal of this instrument? It is evidently an obligation on the part of Hamilton by which he covenants that he has complied with the within agreement—that he had furnished the twenty-two thousand rations. That Byrd, Belding and Shelton were then indebted to him for each ration at the price the government was to pay them, and that Byrd, Belding and Shelton will, at sight, pay to said Belding, or order, the amount of said rations according to contract with government.

“No particular form of words or expressions is necessary to create a covenant, and for that purpose any words will be effectual which show that the parties to a deed have concurred and assented to the performance or forbearance of a future act.” *Marshall vs. Craig*, 1 *Bibb*, 379; *Kendall vs. Talbot*, 2 *Bibb*, 614.

“The recital of an agreement in a deed will create a covenant upon which an action of covenant will lie as well as if it had been contained in the body of the deed.” *Beall's adm'r, vs. Shoals' ex'r*, 1 *Marsh*, 475.

If then Hamilton had not complied with his agreement referred to; if he had not delivered the twenty-two thousand rations; if Byrd, Belding and Shelton were not then indebted to him; or if Byrd, Belding and Shelton would not, at sight, pay to said Belding, or order, the amount of said ration, according to contract with government, Hamilton's covenant was broken, and a right of action immediately accrued to Belding to recover the damages he may have sustained by reason of this agreement. It is a complete answer to the objection that Belding was bound to sue Byrd, Belding and Shelton, and pursue them to insolvency, before Hamilton could be liable. For having

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covenanted that Byrd, Belding and Shelton would pay, at sight, his covenant was broken the moment they refused to pay after sight of the covenant. The covenantor is always bound to make good his covenant to the covenantee, and when A. covenants with B. that C. shall do or abstain from doing a particular act, it is incumbent on A. to see that C. does perform or abstain from doing the particular act. And it is not necessary that B. should make use of all the coercive power of the law to compel a compliance on the part of C. to entitle him to his remedy against A. for a breach of the covenant. For the right accrues the moment the covenant is broken.

We cannot imagine by what process of reasoning the counsel for the appellee has arrived at the conclusion that the consideration paid by Belding was a payment of so much for the firm of Byrd, Belding and Shelton to Hamilton, in discharge of the contract, on the back of which the assignment was made, and that the assignment was an extinguishment of the contract, and a release of any claim which Hamilton might have under said contract over and above the said sum of \$1760. Or, in other words, that the covenant of Hamilton was nothing more than a receipt in full to Byrd, Belding and Shelton, for the twenty thousand rations which he had agreed to furnish for them to the Indians. This objection is so far fetched and so repugnant to the terms of the covenant itself, as to render an agreement to remove it unnecessary. The rule in the construction of covenants, recognized by this court in the case of *Gaster vs. Ashley*, is that they must be taken most strongly against the covenantor. And it is manifest, from the whole instrument, that this assignment and the covenants therein contained was an individual transaction between Belding and Hamilton, with which the firm of Byrd, Belding and Shelton had nothing to do. Belding had advanced to Hamilton the sum of \$1760, and Hamilton, in consideration thereof, assigns this contract to Belding, and covenants that he has performed his part—that Byrd, Belding and Shelton are indebted to him therefor, and that they will, on sight, pay the said sum to Belding. And we again repeat that, having broken this latter covenant, Belding's right of action instantly accrued. And the court below erred in sustaining the demurrer.

TRIMBLE, Contra:

It will be remembered that *Belding*, the plaintiff, was, at the time of the assignment, one of the firm of *Byrd, Belding and Shelton*.

The first objection to the declaration is, that the suit is not brought in the name of Sabin, as administrator, &c., 1 *Ark.* 238, *Brown vs. Hicks*.

Second. There is no cause of action set forth in the declaration. The declaration and writings, made part of the record, show that *Byrd, Belding and Shelton* were indebted to *Hamilton* at least the full amount of the seventeen hundred and sixty dollars—that *Hamilton* would only be responsible for that amount of the rations—and whatever that sum may be, the firm of *Byrd, Belding and Shelton* would owe him that much; so that, in fact, the declaration shows that nothing is really due from *Hamilton*.

Third. The declaration does not show any sum of money that *Byrd, Belding and Shelton* were to pay *Hamilton* for what sum *Hamilton* assigned.

Fourth. Before *Hamilton* can be made responsible on this assignment, the plaintiff was bound to see *Byrd, Belding and Shelton*, and pursue them to insolvency, before *Hamilton* could be made liable by virtue of the assignment; and this must be averred in the declaration. 1 *Ark.* 330, *Gaster vs. Ashley*.

Fifth. The true construction of this assignment is, that the alleged consideration paid by *Belding* was a payment of that sum by *Belding* for the firm of *Byrd, Belding and Shelton*, to said *Hamilton*, in discharge of the contract, on the back of which the assignment was made, that it was an extinguishment of the contract, and the assignment was a release of any claim *Hamilton* might have, under the contract, over and above the said sum of \$1760.

There is no breach or allegation that the money had not been delivered according to contract. There is no allegation that the money was not due.

Belding, by the recitation, being a party to the covenant, admits that the rations had been delivered, and that the sum was due; he also accepted the order.

LACY, *Judge*, delivered the opinion of the court:

The instrument sued on contains an assignment of a contract coupled with a warranty. It is perfectly clear to our minds that the assignments passed no legal interest in the contract attempted to be assigned, according to our statute of assignments, then in force, to the plaintiff, in such manner as to enable him to maintain the action in his own name. *Steele and McCampbell's Dig. p. 74, sec. 1.* But the assignment unquestionably passes the equity in the contract.

It is contended in behalf of the defendant in error that the declaration is defective, because it wholly fails to show that the plaintiff sued in his representative character or capacity. The doctrine upon this subject is correctly laid down in *Brown vs. Hicks*, and in *Lyon vs. Evans, and others*, 1 Ark. 241 and 365. And if the declaration falls within the principles established in these cases, it is certainly defective on demurrer. If a party sues an executor, there must be a substantive averment in the pleadings, showing that he sued in his representative capacity, and nothing by intendment shall be taken to supply the want of such an allegation. But it is immaterial in what part of the declaration or of the pleadings that averment occurs.

The declaration now under consideration expressly contains such an averment, and unquestionably shows that the plaintiff sued in his representative, and not in his individual capacity, for it alleges that Byrd, Belding and Shelton failed to pay the intestate in his life-time for the rations delivered by him, nor have they, as yet, paid the same or any part thereof to the said plaintiff *as administrator as aforesaid.* The enquiry then is, what is the character and nature of the agreement sued on? Is it a covenant or collateral undertaking? No precise or technical words are necessary to create a covenant, but any words which show the intention of the parties will be sufficient for that purpose. Covenant is agreement of two or more persons by deed in writing, sealed and delivered, whereby either one or the other of them doth promise that something is done already, or shall be done afterwards. The true inquiry always is, what are the intentions of the parties? In construing such agreements, it must be considered in reference to the context, and performed according to the spirit and

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intention of the parties. If there be any ambiguity in its terms, such construction must be given as will militate most strongly against the covenantor. By applying these rules to the instrument sued on, they will readily determine its true character. *Gaster vs. Ashsey*, 1 Ark. 335, and authorities there cited.

The latter part of the agreement purports to assign the contract the defendant held upon Byrd, Belding and Shelton to Ludovicus Belding; but this clause, although wholly inoperative as an assignment at law, certainly does not vitiate or destroy the component parts of the agreement. The first clause certifies that the defendant's contract to supply 22,000 rations for Byrd, Belding and Shelton, has been complied with on his part, and that they are indebted to him for the amount of the supplies at the price agreed upon, which was to be ascertained by reference to their contract with the government. This is certainly a covenant; for it certifies that the covenantor had performed his part of the agreement with Byrd, Belding and Shelton, by delivering the 22,000 rations of supplies for the emigrating Choctaw Indians, and that they stood indebted to him for the amount of rations so delivered. It is true that the amount is not set out in the agreement, but that is capable of being ascertained by reference to Byrd, Belding and Shelton's contract with the government, which fixes the price which is to be paid for each ration. The word certify, which is used in the agreement, is certainly equivalent in its signification and meaning to the word promise, agree or declare, and these latter words are as capable of covenant, as the words grant, warrant or guarantee. Does the term certify, as used in the instrument, correspond with that covenant? That it does, is perfectly manifest, from the fact that the instrument is put under seal, and that it was the covenantor's intention to make such an agreement, and so it was understood by the covenantee as well as himself. For upon this certification or warranty, he paid the covenantor the sum of \$1750, and to it he looked for indemnity in full confidence that its stipulations would be complied with. The last clause in the instrument, after reciting the assignment, contains this peculiar and significant expression, "that the said Byrd, Belding and Shelton will pay, on sight, to said Belding, or order, the amount of said rations according to this contract." What, then, is the

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meaning of this language? It is a covenant that Byrd, Belding and Shelton will pay, at sight, the amount of rations delivered according to their contract. And does the covenantor certify that fact to the covenantee? This latter part of the sentence has no connection with the assignment although it immediately follows it. For the sense of the agreement would be unintelligible upon any such interpretation. To assign that Byrd, Belding and Shelton would pay at sight, is an unmeaning and useless expression. But to certify that they would do so is both intelligible and rational.

The instrument is under seal, and that gives to it such a character of a covenant as carries with it a good or valuable consideration, and it must be construed and taken most strongly against him who executed it. This being the case, the covenantor certified to Ludovicus Belding, Byrd, Belding and Shelton's indebtedness to him, and that they would pay said Belding on sight. There are three distinct and separate covenants in the agreement, and upon each of these covenants the covenantor is bound to make his stipulation good: First, that he had performed his part of the agreement; second, that Byrd, Belding and Shelton were due him for the rations he had delivered; and, thirdly, that they would pay the amount then due to Ludovicus Belding at sight. All these three things he covenanted were true, and he cannot now be permitted to exonerate himself from any of them, provided the plaintiff has properly charged him in his declaration.

It is said, in behalf of the defendant, that the covenant was not binding upon the party making of it, for it was a guaranty to Ludovicus Belding, who constituted one of the firm of Byrd, Belding and Shelton, and therefore his making the agreement operated as a payment by one partner for the benefit of the firm, and consequently no action could be maintained upon such a contract. It is wholly impossible for this court, judicially, to know any such thing. The defendant has not thought proper to put such fact in issue. And the record no where shows that Ludovicus Belding was one of the firm of Byrd, Belding and Shelton.

The declaration is very inaccurately drawn, and sets out no substantial breach in such manner as will render the defendant liable. It contains no averment that the defendant had not performed his part

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of the agreement with Byrd, Belding and Shelton, neither does it allege that they were not indebted to him by reason of non-performance of his contract. It states that the agreement sued on was presented to Byrd, Belding and Shelton, and they refused to pay according to its true meaning and effect, and upon this allegation it attempts to charge the liability of the defendant. The allegation is wholly insufficient for that purpose, for it fails to state at what time the covenant was presented, or by whom presented; and nothing can be presumed by way of intendment that will cure the defect. Whether it was presented before or after the assignment, or by whom presented, it is impossible to determine. There is no specific allegation that they failed to pay at sight. The averment relied on is therefore insufficient to raise any liability. There being no sufficient breaches assigned, of course the court below rightly sustained the demurrer. The judgment of the circuit court must therefore be affirmed with costs.

THE AUDITOR *against* ANTHONY H. DAVIES, AND OTHERS.

APPEAL from Chicot Circuit Court.

The Auditor of Public Accounts is not a judicial officer, nor can he exercise judicial power or authority.

Whether the issuing of a distress warrant against a sheriff and his securities by the Auditor is an exercise of judicial power, left undecided.

The power and authority of each Circuit Judge in this State are restricted and limited to the prescribed and ascertained boundaries of his circuit.

No writ or process, issuing out of any Circuit Court, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues, according to the principles of the common law.

Consequently, a Circuit Court of one county cannot run its writ of process into any other county, without some legislative provision on the subject.

There being no legislative provision, authorizing the Circuit Court of Chicot county to issue a writ of certiorari to the Auditor of Public Accounts, a writ issued to the county of Pulaski is void.

A sovereign state or government cannot be sued without some legislative provision authorizing such proceeding; and the statute must be strictly followed.

All suits against the State must be brought in the Circuit Court of the county in which the seat of government is situate, and be against the State by name; and the process must be a summons executed by delivering a copy to the Auditor.

The Auditor is by law to keep his office at the seat of government: consequently he is beyond the reach of the jurisdiction of the Chicot Circuit Court, or any order of the Judge of that Circuit for or against the State.

A certiorari to the Auditor, to bring before the Circuit Court the proceedings of the Auditor in issuing a distress warrant, is, to all intents and purposes, a suit against the State.

All proceedings on such writ are therefore extra-judicial, and *coram non iudice*.

Absent, RINGO, Chief Justice.

Upon a petition and affidavit of Anthony H. Davies, and others, a writ of certiorari to the Auditor of Public Accounts of the State was issued by the Judge of the Chicot Circuit Court, returnable unto that court, with a supersedeas to the Coroner of Chicot county, to bring before the court a distress warrant issued by the Auditor against them as securities of the former Sheriff of Chicot county, with the proceedings of the Auditor prior to issuing the warrant, for revision in that court. The writ of certiorari was issued to, and executed in, the county of Pulaski. Upon the hearing, that court adjudged the distress warrant void, and to have issued without constitutional power in the Auditor, and ordered it to be perpetually superseded. From this decision the Auditor appealed. The whole merits of the case were

argued in this court, but the case having been decided on a preliminary question, it is not necessary to recite the facts of the case, or the arguments upon the principal questions involved.

CLENDENIN & HEMPSTEAD, for the appellant:

The Circuit Court had not the authority to issue a certiorari directed to Elias N. Conway, Auditor of Public Accounts of the State of Arkansas, either in vacation or in term time. The Constitution of the State of Arkansas gives to the Supreme Court the power to issue writs of error and supersedeas, certiorari and mandamus, habeas corpus and quo warranto, and other remedial writs, and power to hear and determine the same. The 2d Section, 6th Article of the Constitution constitutes and gives to the Circuit Court original jurisdiction in all criminal cases, which shall not be otherwise provided for by law; and exclusive original jurisdiction in all crimes amounting to felony, at common law; and original jurisdiction of all civil cases which shall not be cognizable before Justices of the Peace, until otherwise directed by the General Assembly; and original jurisdiction in all matters of contract when the sum in controversy is over one hundred dollars. *Sec. 3, Const., 6th Art.* And in section 5, the Constitution says, the Circuit Court shall exercise a superintending control over the County Courts and over Justices of the Peace in each county of their respective circuits, and shall have power to issue all necessary writs to carry into effect their general and specific powers.

What, then, are their general and specific powers? They are a superintending control over the inferior judicial tribunals; in the exercise of which they may issue writs of mandamus, certiorari and habeas corpus, but these writs cannot be extended to any other than those inferior tribunals. Where, then, did the Circuit Court, get the power to issue this writ of certiorari to an officer belonging to one of the independent branches of the government? If they do not acquire it under the Constitution they cannot acquire it at common law, because it is a tribunal exercising its jurisdiction under the provisions of the Constitution; and when that unchangeable rule of government says that the Circuit Court shall do one thing, it can do that, and no other. *Expressio unius est exclusio alterius.* As well might

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the Circuit Courts claim the power of issuing a quo warranto exercising a franchise, as to issue a certiorari to a department of equal authority and importance with its own, or any other writ not necessary to carry out its general and specific powers, as one to carry out a power never conferred upon it by the Constitution.

A certiorari is an original writ issuing out of the Court of Chancery, or King's Bench, directed in the King's name to the Judges or officers of the inferior courts, commanding them to certify or to return the records of a cause depending before them—to the end that the party may have the more sure and speedy justice done before the King, or such other Justices as he shall assign to determine the cause. 1 *Jacobs' Law Dic.* 411; 1 *Tidd* 329.

According to this authority the writ of certiorari could only issue from a superior to an inferior court. Anciently, it seems no other court but the Chancery could grant a certiorari on a suggestion that there was nothing before them; but it is now settled that a record may be removed into the King's Bench as well by certiorari out of that court, as by a mittimus out of Chancery. 1 *Tidd* 333.

The writ of Chancery should be directed to the Judge or Judges of the inferior courts from which the cause is intended to be removed. 1 *Tidd* 334. A certiorari does not lie to remove any other than judicial acts. *Jacobs' Law Dic.* vol. 1, p. 412. A certiorari lies to every inferior jurisdiction of record. 1 *Salk* 144.

These authorities will sustain the position before taken that the writ of certiorari can only issue from a superior to an inferior tribunal; and the Circuit Court of Chicot county therefore erred in issuing the writ in this case.

TRAPNALL, COCKE & PIKE, *Contra*:

The writ of certiorari in England was used for various purposes. It is defined in Bacon as an original writ issuing out of Chancery or King's Bench, directed in the King's name to the Judges or officers of inferior courts, commanding them to return the record depending before them, to the end the party may have the more sure and speedy justice before him, or such other Justices as he shall assign to determine the cause.

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One principal use of the writ was to bring into the court of King's Bench the record of convictions in criminal matters before inferior courts or tribunals.

Another of its uses was, that where in the Common Pleas the defendant pleaded *nul tiel record* in a suit upon a judgment in King's Bench, then the plaintiff could obtain a certiorari out of Chancery to send the record thither, which might then by mittimus be sent into the Common Pleas. *Luttrell vs. Lea, Cro. Car.* 297; *Pitt vs. Knight, 1 Sand.* 98.

Again: it was extensively used as a remedy in the nature of a writ of errors in civil cases, as in this way it generally issued from the court of King's Bench. Where the judgment complained of was rendered by a court proceeding according to the course of the common law a writ of error lay, and there the superior court was authorized to render the same judgment as the court below ought to have rendered. But if the inferior tribunal proceeded in a course different from that of the common law, the only mode of correcting any error that might have occurred was by certiorari, on which the superior court could only affirm the proceedings if regular, or quash them if irregular, by the court below having exceeded its jurisdiction or otherwise. *Dr. Groenvelt vs. Dr. Burwell, et al.* 1 *Id.* Raym. 469; *S. C.* 1 *Salk.* 144; *Comm. vs. Ellis*, 11 *Mass.* 465; *Edgar vs. Dodge*, 4 *Mass.* 670; *Melvin vs. Bridge*, 3 *Mass.* 305; *Vandusen vs. Comstock*, 3 *Mass.* 184.

In this way it was held that the writ of certiorari for the reason, that said HOLT, Chief Justice, in *De Groenvelt vs. Burwell, Salk. ubi sup.* "No court can be intended exempt from the superintendency of the King in this court of King's Bench. Thus the writ lay to Justices in Eyre: to the College of Physicians, 1 *Salk.* 144: to Commissioners of Sewers *anon.* 1 *Salk.* 145, 1 *Strange* 609: to a Coroner who has taken an inquest, or after his death to his executor, *Bac. ab. certiorari*, (F): to a Bishop to certify admission, institution, and induction to a church, *Com. Dig. cert.* (A) (1): to a Sheriff for the record of a *redessurin* or *post dessurin* before him, *ib.*: to Sheriffs or Coroners to certify an outlawry, *ib.* And in every such case it lay, where the statute did not *expressly* and *totidem verbis* take away the certiorari, and direct that *no certiorari should* issue even if it were

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provided that the decision in the inferior court should be final. *Rex vs. Mosely*, 2d Burr, 1042; but it did not to remove mere ministerial acts, but only to remove judicial acts, *Rex vs. Lediard*, Sayer 6.

There was still another manner in which the writ of certiorari was used, and this was where a party was sued in an inferior court, to transfer his cause by certiorari into one of the King's Courts for trial. In this way the writ might issue as well from the Common Pleas as from King's Bench. The ground upon which this writ was allowed may be judged of from *Cross vs. Smith*, 3 Salk. 79. That was a case upon a certiorari from the Common Pleas to the Court of Ely, and the writ being allowed by the Common Pleas, and they afterwards proceeding thereon, a writ of error was brought into King's Bench, and that matter was assigned for error. The defendants pleaded a grant of consuance of pleas to the Bishop of Ely, and an allowance thereof in *B. Ranno* 21, *Ewd. III*, and that the cause did arise within the jurisdiction. This was returned on the certiorari, and there was a demurrer thereto, and HOLT, Chief Justice, held that there were three sorts of inferior jurisdictions.

1st. One whereof is *tenere placeta*, and this is the lowest sort, for it is only a concurrent jurisdiction, and the party may sue there or in the King's Bench if he will; and in this case it appears from the decision, if the case is commenced in the inferior court, the party sued has the right to remove his case into one of the King's courts by certiorari.

2nd. *Consuance of pleas*, whereby a right personal to the lord himself is vested in the lord of the franchise to hold the plea, and here to prevent oppression a certiorari will lay to take the case into one of the King's courts.

3rd. *An exempt jurisdiction*, as where the King grants to the inhabitants of a city that they may be sued within their city.

And so he determined that "there is no jurisdiction which can withstand a certiorari," 1 Salk. 148; *S. C. 2nd Ld. Raym*, 836, *S. C.*

Another ground on which the certiorari often issued was to draw to the court of King's Bench jurisdiction over cases which by law belonged to that court. *Tidd*. And it is principally upon this ground that we shall contend for the power of the Circuit Court to issue the

writ in this case. The court of King's Bench was a court of extensive jurisdiction, both original and appellate. The original jurisdiction belongs in this country to the Circuit Court, and they as to that jurisdiction, are the court of King's Bench of this country. The issuing of writs of certiorari was sometimes an exercise of original, and sometimes of appellate jurisdiction, and so far as it was used to draw to that court, or to the Common Pleas, the original jurisdiction of matters which of right those courts were entitled to adjudicate upon, it must be held that they belong to the Circuit Courts of this country in the same manner and to the same intent. In the United States the writ has been variously used in the different States. In Massachusetts it is only used by statute as process of error. In New York it has a more extensive application. It is there held that whenever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that authority illegally and to the injury of the individual, he may have redress by certiorari. *Lawton vs. Com. of Cambridge*, 2 Caines, 179; *Wildy vs. Washburn*, 16 T. R. 49. Thus it lays there, to remove the acts of Commissioners of Highways, the appointment of a Constable by Justices of the Peace, the acts of Canal Appraisers. *Fonda vs. Canal Appraisers*, 1 Wend. 288: to Commissioners of Insolvents, *anon* 1 Wend. 90.

So it lies to the Trustees of a village who have widened a street, and so injured the property of an individual, and levied his damages sustained thereby on the owners of property benefitted, in behalf of the persons upon whom the damages were so levied; and it was laid down that though the party might have a remedy by action, that did not prevent him from pursuing his remedy by certiorari. *Straw vs. Trustees of Rochester*, 6 Wend. 564; and see *Albany Water Works Co. vs. Albany Mayor's Court*, 12 Wend. 292; *Bath Bridge Co. vs. Magour*, 8 Greenl. 292.

If then the Circuit Court had the power to issue the certiorari in a case which properly fell within its own jurisdiction, as a means to draw to itself jurisdiction given to it by the Constitution, and upon the application of persons entitled to be heard and tried in the court of highest original jurisdiction in the State, the persons entitled to be tried and have their liabilities to the State determined by the course

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of the common law and by a jury of their peers; if the Circuit Court representing here as to one portion of the judicial power, the courts both of King's Bench and Common Pleas, and exercising also the original civil and ceremonial jurisdiction of both these courts, can issue this writ in a case proper therefor, and can interfere to prevent a usurpation of its power by another and an inferior tribunal, then it remains to inquire whether the case presented by the petition was sufficient to warrant the exercise of that power. We have already examined and presented to the court the facts stated in the petition.

LACY, *Judge*, delivered the opinion of the court:

There have been several distinct propositions raised by the assignment of errors and discussed at the bar that we do not feel ourselves called on at this time to determine. The main question in this cause is, did the court below rightfully exercise jurisdiction in the premises?

Before we proceed to settle this point, it may be well to define the meaning of the writ of certiorari, according to the English practice, and also to state a few of the most prominent uses to which it was applied. Lord BACON defined it to be, "an original writ issuing out of Chancery, or the King's Bench, directed in the King's name to the Judges or officers of the inferior courts, commanding them to return the record pending before them—to the end that the party may have more sure and speedy justice, before him or such other Justices as he shall assign to determine the cause." One of its uses was, to bring into the court of King's Bench the record of conviction in criminal matters before inferior courts or tribunals. Another of its uses was, where a party was sued in an inferior court to transfer his cause into one of the King's courts for trial. In this way the writ issued, as well from the Common Pleas, as from the King's Bench. Again, it is extensively used as a remedy in the nature of a writ of error in civil cases; and when that is the case, it generally issued from the court of Kings Bench. When an inferior tribunal proceeds in a cause contrary to the course of the Common Law, then the writ lay to correct the error, if any had accrued. If the court below exceeded its jurisdiction, the Supreme Court would quash the proceedings for irregularity; but when, upon inquiry, they were found to be regular,

the judgment below was affirmed. *De Groenvelt vs. Dr. Burwell, et al.*, 1 L. Ray. 469; 1 Salk. 144; *Comm. vs. Ellis*, 11 Mass. R. 465; *Edgar vs. Dodge*, 4 Mass. 667; *Van Dusen vs. Comstock*, 3 Mass. 184; *Cross vs. Smith*, 3 Salk. 79; 2 L. Ray. 836. Another ground upon which the writ often issued, was, to draw to the court of King's Bench jurisdiction over cases which by law properly belonged to it. And it is mainly upon this latter ground that the power of the Circuit Court to issue the writ in question is now claimed.

It will be seen, from the definition of the writ, and from the uses to which it was principally applied, that it was, generally, if not universally, directed to judicial officers in the exercise of judicial powers or authority. It is clear that the Auditor of Public Accounts is not a judicial officer. Nor can he exercise judicial power or authority. For the Constitution vests the whole judicial power of the State in the Supreme Court, in Circuit Courts, in County Courts, Probate Courts, and in Justices of the Peace. (See *Art. 6, Sec. 1, Con. Ark.*) Whether or not the Auditor of Public Accounts, in the present instance, has assumed to exercise judicial power or not, we do not deem it necessary to inquire in this investigation. We have already had occasion to analyze and determine the powers and jurisdiction of the several judicial tribunals, as ordained and established by the Constitution. The general doctrine upon that subject will be found fully explained and illustrated in the case of *The State vs. Ashley, and others*, on a motion for an information in the nature of a quo warranto, in *Linton vs. Berry*, and in *Fisher vs. Hall and Childress*, and *Heilman vs. Martin*. The court in delivering the opinion in the case first referred to, says, "in directing the organization of the judicial" department, it was the object of the convention to provide for the whole people of the State, through the several judicial tribunals, a free, ample, speedy, cheap and convenient administration of justice. For which purpose various tribunals, of different grades, were ordained and ordained by the Constitution, and one or more of them established in every township and county in the State; and a jurisdiction was conferred upon each by the Constitution, corresponding in interest and magnitude with their respective grade and dignity; and in such manner, that the whole judicial

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power of the government became vested in some one or other of these courts." The principle of a separate and distinct jurisdiction pervades and runs through our whole judicial system; and the Constitution has preserved one unbroken and harmonious chain of action through the entire plan. Each separate tribunal is left free in the exercise of its lawful and constitutional authority, and its subordinate parts are only restrained by a superior jurisdiction whenever they transcend the limits of the grant which created them. To assume for any one of these tribunals a jurisdiction greater or less than is conferred by the Constitution, is not only virtually to abrogate and destroy all the distinctions and divisions of separate constitutional jurisdiction between the several respective courts, but it is, in effect, to ordain and establish a wholly different will or rule of action from the one laid down by the convention. The Supreme Court has appellate jurisdiction only, except in cases otherwise provided for by the Constitution. The Circuit Courts have original jurisdiction in all criminal cases not otherwise provided for by law; and exclusive original jurisdiction of all crimes, amounting to felony, at common law; and original jurisdiction in all civil cases which are not cognizable before Justices of the Peace, until otherwise directed by the General Assembly; and original jurisdiction in all matters of contract, where the sum in controversy is over one hundred dollars. The Constitution then declares that, "the State shall be divided into convenient circuits, each to consist of not less than five, nor more than seven counties, contiguous to other; for each of which a Judge shall be elected, who, during his continuance in office, shall reside, and be a conservator of the peace within the circuit for which he shall have been elected:" and, "that the Circuit Courts shall exercise a superintending control over the County Courts, and over Justices of the Peace, in each county in their respective circuits; and shall have power to issue all the necessary writs to carry into effect their general and specific powers." (*Sec. 4 and 5 of Art. 6.*) "The Judges of the Circuit Courts may temporarily exchange circuits or hold courts for each other, under such regulations as may be prescribed by law:" and when that is the case each officer must *pro tanto* be considered Judge

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of the particular circuit, for the time being, in which and for which he is acting. *Art. 5, Sec. 12, of the Cons.*

The foregoing clauses of the Constitution have distributed the State into a given number of separate and independent circuits, and they have required and authorized a Judge to be elected and commissioned for each of those circuits, whose power and authority are restricted and limited to the prescribed and ascertained boundaries of his particular district. And the Constitution has, furthermore, established a Circuit Court in each county of the State, and it has fixed and confined its territorial jurisdiction within the boundaries thereof; and to the circumference and extent of those limits each Circuit Court has a superintending power and control over County Courts and Justices of the Peace; and is clothed with ample authority to issue all the necessary writs to carry into effect its general and specified powers. But no writ or process, according to the principles of the common law, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues. It is, then, clearly manifest, as there is a circuit court established for each county in the State, that the court of one county cannot run its writs or process within the boundaries or limits of another county, without some legislative provision upon the subject. What class of cases, and for what purposes, the legislature may authorize the Circuit Court of one county to run its writs of process, and have the same executed within the boundaries or limits of another, or of different counties, is a question of some nicety, and we do not take upon ourselves now to determine, as that point is not expressly or legitimately before us. In the present instance, as there is no legislative enactment authorizing the Circuit Court of Chicot county, or the Judge thereof in vacation, to issue the writ in this case to the Auditor of Public Accounts, and as the writ has been run into and executed upon him in the county of Pulaski, we are clearly of the opinion that it has been illegally and improvidently issued; and therefore null and void. Having disposed of this branch of the case, we will next inquire how and in what manner the State can be sued. The Constitution declares "that the Legislature shall, by a vote of both Houses, elect an Auditor of Public Accounts:" and requires him to "keep his office at the seat of government, and to perform such

duties as may be imposed on him by law." *Art. 5, Sec. 21, of the Cons.* It also gives to the General Assembly "the power to prescribe by law in what court, and in what manner, suit shall be commenced and prosecuted against the State." *Art. 5, Sec. 22.*

In obedience to this injunction, the Legislature have declared that "all actions against the State shall be brought in the Circuit Court of the county in which the seat of government is situated, and be against the State by name." "The process, in all actions against the State, shall be a summons, and shall be executed by the officer to whom it may be directed by delivering a copy thereof to the Auditor of Public Accounts." *Rev. Stat., C. 416, S. 1 and 2.*

The statute gives to the party injured authority to sue the State by name, and it makes it the duty of the Auditor to appear and defend the action whenever process is served upon him; and it expressly declares that, when a suit is instituted against the State, "it shall be brought in the Circuit Court of the county in which the seat of government is situate." A sovereign state or government is incapable of being sued without some legislative provision authorizing such a proceeding; and the statute must be strictly followed.

This court is bound, judicially, to know that the Auditor of Public Accounts keeps his office at the seat of government in the city of Little Rock; consequently, he is beyond the reach of the jurisdiction of any suit brought in the Chicot Circuit Court, or the order of the Judge of that circuit. The present proceeding can be considered in no other light than a suit, to all intents and purposes, instituted against the State. The proceedings possess all the constituent parts of a suit; the *actus reus et judex*; and it is certainly a suit against the State, for the appellees do not seek to make the Auditor personally responsible, but merely to release themselves from a liability as securities on the official bond of the sheriff, which the State holds against them. We have already shown such a suit can only be brought and prosecuted in the Circuit Court of the county in which the seat of government is situated, or in some other court having cognizance in such case over the subject matter in dispute, and whose jurisdiction is co-extensive with the limits of the State. If this position be true, and it seems to us not to admit of a doubt, then it necessarily follows, be-

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cause Chicot Circuit Court is not the county in which the seat of government is situated, the Judge thereof had no lawful power or authority to award the writ of certiorari directed to the Auditor of Public Accounts, and thereby take cognizance of the cause and proceed to adjudicate the matter. This being the case, of course all his acts, and those of the Chicot Circuit Court, were *wholly extra-judicial*. The judgment of the court below must therefore be reversed, with costs; and the cause remanded, to be proceeded in agreeably to this opinion here delivered, which is, that the writ of certiorari and ~~supersedeas~~ be dismissed, with costs, by said court for want of jurisdiction to award the same.

DUDLEY D. MASON *against* JAMES McCAMPBELL.ERROR to *Pulaski Circuit Court.*

In proceedings under the attachment law, the answer of a garnishee is *prima facie* evidence of the truth of the allegations it contains.

But these allegations may be rebutted or disproved by any other competent evidence. And where it is assigned for error that the court below refused to instruct the jury that the answer of the garnishee under oath should be taken as true until disproved by the plaintiff, the bill of exceptions should set out all the evidence in the case, or show that there was no other evidence.

If this is not done, the legal presumption is that the court below refused to give the instruction, because the answer was disproved or rebutted.

Absent, RINGO, *Chief Justice.*

This was a proceeding against Mason, as garnishee, according to the provisions of the statute of the Territory in force at the institution of the suit. McCampbell, the plaintiff below, commenced an action of assumpsit against Steele, a non-resident debtor, by suing out a writ of attachment, and obtained judgment against him on the trial of the cause. The writ was regularly served upon the garnishee, and the plaintiff then exhibited and filed his interrogatories, calling upon Mason to answer all and singular the allegations exhibited against him. The garnishee thereupon appeared and put in his answer, setting forth the goods, chattels, credits, and effects in his hands, and insisting upon an indebtedness of the defendant to him in a greater amount than the value of the property in his possession. This allegation the plaintiff denied, and a jury was thereupon summoned to try the issue between the parties, and a verdict and judgment rendered in favor of the plaintiff.

Upon the trial the counsel of Mason moved the court to instruct the jury that the answer of the garnishee under oath should be taken as true until it was disproved by the plaintiff. The bill of exceptions discloses this single fact, and states that the court overruled the instructions; which opinion was excepted to, and the case taken up by writ of error.

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TRAPNALL & COCKE, ASHLEY & WATKINS, for plaintiff in error:

The instruction moved for in this case was not a mere abstract question of law. The record shows it to have had a direct connection with the answer of Mason, the truth of which was then in issue without the forms of pleading before the jury.

To give the answer of a garnishee the best construction for the opposite party, is to put it on the same footing with the answer of a defendant in Chancery, or of a party to a bill of discovery. The plaintiff in the attachment by his own act calls upon the garnishee to disclose, and by the rule of equity makes that answer evidence. It is a hard rule then, and by reference to the authorities it will be seen to have been founded on extreme cases; to make one part of the answer of a garnishee or defendant to charge himself and be evidence against him, while another part of the answer, equally true, and which by explaining the whole transaction, tends to discharge him, is not admissible unless substantiated by other evidence.

But this rule of law is only applicable to cases where the party answering, admitting the facts in the bill, sets up other facts in defence or avoidance. The general rule of law is, that an answer responsive to the bill is proof in favor of the defendant, as to the matters of fact of which a disclosure is sought from him, and it is conclusive in his favor, unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts. 2 *Story Eq. Juris.*, 743-4; and according to the same authority, and all the authorities on this subject, a denial which is responsive to the bill, or matter to be discovered, is evidence in favor of the party answering and puts the opposite party upon disproving it.

But there is another rule of law applicable to this case: that a party who reads an answer (in a trial at law) makes the whole of it evidence, for it is read as the sense of the party himself, which must be taken entire and unbroken. 1. *Stark Ev.* 286 ; *Bac. Ab. Ev.* 622 ; *Lynch vs. Clark*, 3 *Salk*, 154. And when an answer in Chancery is given in evidence in a court of law, the party is entitled to have the whole of his answer read; it is to be received as *prima facie* evidence of the truth of the facts stated in it, open however, to be rebutted by

the opposite party. *Lawrence vs Ocean, Ins. Co.*, 11 J. R. 260; *Hoffman and others vs. Smith*, 1 Caine's Rep. 157.

There seems to be an exception to this rule, that where the answer charges the defendant by the admission of one fact, and also charges him by the statement of a distinct and further fact, the rule has been said to be, that what has been admitted need not to be proved by the plaintiff, but the defendant must make out his fact in discharge. But here again the distinction was taken, that if the admission and discharge had been one entire fact, it ought to have been admitted unless disproved, because nothing of the fact charged was admitted. 1 *Stark Ev.*, 286-7; *Woodcock vs. Bennett*, 1 Cow. Rep., 743; *Hart vs. Ten Eyck*, 1 C. R., 89, 93.

The answer of Mason is evidence, and that evidence shows that the instruction moved for was not an anstract question of law, but inseparably connected with the merits of the case; and that the refusal of the court to instruct was calculated to mislead the minds of the jury in making up their verdict, and prevented them from attaching that weight to the answer of Mason which it deserved.

It is contended that the court will presume every thing to have been proven which ought to have been proven to justify the finding of the jury. Such a presumption would be a little more violent, if this court would presume that such a fact, and all other necessary facts, were proven by two witnesses, instead of one, which it is necessary to do in order to weaken the conscientious answer of Mason.

PIKE, Contra:

The instruction moved for by the plaintiff in error in this case, was "that the answer of Mason should stand as true, until it was disproved."

This instruction was upon a mere abstract point of law. The plaintiff in error has not incorporated any evidence in his bill of exceptions; nor does the bill of exceptions show that Mason's answer was the only evidence in the case—and that no evidence was introduced to disprove it.

The rule therefore, established by this court in *Edwards vs. Danly*, 1 Ark. 437; applies directly to this case. The court is now bound to presume that there was sufficient evidence produced to warrant the

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finding, and whether the instruction asked would have been correct or not, is a matter of no importance. The court will not, and in justice cannot, reverse any judgment because the court below erroneously refused to give a certain instruction; unless the plaintiff in error show that the instruction, if given, would have changed the result below. This he must show affirmatively. But here the court do not know that the instruction, if given, would have been of any avail, and are bound to presume that it would not.

Were it not so, the instruction asked for was entirely too broad, and and could not, consistently with law, be given. The plaintiff in error contends that the answer of a garnishee is like an answer to a bill for discovery. We are not aware of any particular difference between an answer to such a bill and to any other bill.

Justice STORY says, in *The United States vs. Langton and Trustees*, 5 *Mason*, 281, that the answers of a trustee (or garnishee) under the trustee process in attachment in Massachusetts, "are not to be more rigidly or differently construed from what they would be in a bill in Chancery."

What then is the effect of an answer in Chancery as evidence for the party who files it?

In *Bidgeway vs. Darwin*, 7 *Ves.*, 405, it was determined, that where an executor is charged by his answer with the receipt of money he cannot discharge himself by affidavit, of different sums paid by him to the testator in his life time.

In *Thompson vs. Lambe*, 7 *Ves.* 587, it is laid down as the rule, that where a party is charged by his answer, he cannot discharge himself, unless the whole is stated as one transaction—as, that on a particular day he received a sum and paid it over—not, that on a particular day he received a sum, and on a subsequent day paid it over.

So he must charge and discharge himself in the same sentence. *Kirkpatrick vs. Love, Ambler*, 589.

In *Robinson vs. Scotney*, 19 *Ves.*, 546, the defendant charged himself with the sum of £400, received by him after his testator's death, and then set up various debts due from the testator to himself, which left a balance in defendant's favor. The Master of the Rolls decided, that the plaintiff might lay his finger on the admission of the debt of

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£400, and had nothing to do with defendant's allegation of a larger debt due him from the testator—and that the defendant, where he charges himself in one part of his answer, and sets up demands as credits in another part, must prove them. And the instance given by him, where a man can discharge himself by his answer, is, where he says that he received a sum, and immediately handed it over.

In *Boardman vs. Jackson*, 2 Ball and Bea. 385, Lord MANNERS said, “where a bill is filed, calling on a defendant to account, and the plaintiff is entitled to an answer, if the defendant set forth in the schedule to his answer an account, charging himself with sums of money, and in another schedule an account of the disbursements of those sums, he cannot, according to the practice of this court, avail himself of the second schedule to discharge himself in taking the account, although he would be charged on his admissions in the first schedule.

In *Randall vs. Phillips*, 3 Mason, 383, Justice STORY says, “so far as the answers in this cause set up new facts by way of discharge or avoidance of the matter of the bill, or allege separate and independent agreements, they are not evidence for the defendants; but all such allegations must be substantiated by proof *ali unde*. This is the general doctrine in equity, and is not now susceptible of any real doubt.”

The same general rule is recognized in 2 Story's *Equity*, 745; *Briggs vs. Penneman*, 8 Cowen, 387; and *Woodcock vs. Bennett*, 1 Cowen, 744.

So in *Dunham vs. Jackson*, 6 Wendell, 30, the law was laid down to be, that “when an answer admits a distinct fact, which goes to charge the defendant, and alleges another, not responsive to the bill, by way of discharge or avoidance of that admitted, the latter is not established by the answer. If a guardian or trustee is called on to account, and in his answer admits a sum of money to have been received, and then proceeds to show the appropriation of it, what he says about the appropriation, unless that and the receipts of it can be regarded as parts of a single transaction, is not evidence in his favor.” See also *Green vs. Hart*, 1 J. R., 580; *Wells vs. Query*, Lit. Sel. Cas., 210; *Paynes vs. Coles*, 1 Mun., 373.

LACY, Judge, delivered the opinion of the court:

It is impossible for this court to know whether the instructions were rightfully or wrongfully overruled, or what influence, if any, they might have had upon the verdict given.

The bill of exceptions does not state that the answer of Mason constitutes all the evidence produced upon the trial; and therefore we are bound to presume that the judgment and verdict of the court below was in accordance with the justice and right of the case.

It is certainly true that the answer of the garnishee is *prima facie* evidence of the truth of the allegations it contains. But these allegations may be rebutted or disproved by any other competent evidence. If there was no other evidence in the case, but the answer of the garnishee, it would then amount to full and conclusive proof of the facts it asserted. But if it was disproved, or the presumptions in its favor weakened or overthrown, all of which it is surely competent for the plaintiff to establish, then it would be entitled to no weight or consideration at all. In the present case, the court below may, and probably did refuse the instructions asked for, upon the ground that the garnishee's answer was disproved by other higher legal evidence adduced in support of the plaintiff's right of action. Be that however as it may, such is the legal presumption in favor of the verdict and judgment below, and of course we are bound by it. It was the duty of the party excepting, if there was no other evidence offered upon the trial, to have placed that fact upon the record, so that this court could judicially know whether the instructions asked for were properly or improperly refused. Having failed to do so, he cannot now take advantage of his own neglect or omission, and consequently the judgment of the court below must be affirmed with costs.

AMBROSE H. SEVIER *against* PETER HOLLIDAY.ERROR to *Clark Circuit Court*.

An attorney is not liable in the discharge of his official duty, for claims put into his hands to collect as such attorney, unless it be shown that he has been guilty of culpable negligence in the prosecution of the suit, and that thereby the plaintiff has lost his debt.

Nor can he be held liable for money collected by him as an attorney, unless a demand be made upon him and he refuses to pay it over, or remit it, according to the instructions of his client.

Where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet, if the issue joined be such as necessarily requires, on the trial, proof of the facts so defectively or improperly stated, or omitted, and without which it is not to be presumed that either the Judge would have directed the jury to give, or the jury would have given, a verdict, such defect, imperfection or omission, is, by the Common Law, cured by the verdict.

After verdict, nothing is to be presumed, except what is expressly stated in the declaration, or what is necessarily implied from the facts that are stated: that is, where the *whole* is stated to exist, the existence of the *parts* is implied; and where the *claim* is alleged to exist, the existence of the *component links* will be implied after verdict.

If the plaintiff wholly omits to state a good title or cause of action, even by implication, matters which are neither stated nor implied need not be proved at the trial, and there is no room for intentment or presumption; as the intentment must arise from the verdict, when considered in connection with the issue upon which it was given.

If any thing essential to the plaintiff's action be not set forth, though the verdict be found for him, he cannot have judgment; because, if the essential parts of the declaration be not put in issue, the verdict can have no relation to it; and if it had been put in issue it might have been found false.

Therefore, in an action against an attorney, for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person, calling for so many dollars, to bring suit on, recover and collect of that third person, for the use and benefit of the plaintiff, for certain fee and reward to the defendant in that behalf; is so defective in stating the plaintiff's title to sue, that a verdict upon it in favor of the plaintiff will not sustain the judgment.

No title to the note, in the plaintiff, is stated by, or implied in, any of these allegations; and no facts are stated, which could not be proven, without at the same time establishing the plaintiff's title to the note, or legal right to receive the proceeds.

Nor is it stated or implied that the note was due when so delivered, nor to whom it was payable, nor what sum, (if any thing,) was due upon it.

Such a count shows a defective title, and not a title defectively stated: and no proofs are admissible under such a count, which can make it good.

And under such a count, a receipt given by the defendant stating that he had received of the plaintiff a note of so many dollars, against A. B. in favor of C. D., so far from proving the title to the note to be in the plaintiff, proves it to be in C. D., who is the legal owner, and is held in law to have possession of it. Such a receipt is, therefore, inadmissible as evidence under such a count.

Reasons assigned by the court for permitting particular evidence to be adduced, not given as instructions, nor addressed to the jury, can have no bearing on the case:

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nor can they be excepted to. The Court of Errors looks to the admission or rejection of the testimony, and not to the reasons assigned for it.

A party cannot be allowed to prove more than he has alleged in his declaration; and when he omits to allege a fact essential to his action, and not involved or implied in the pleadings, or inferable from the verdict, he can offer no proof of such a fact.

A party having no interest in a note cannot be injured by the failure of an attorney to collect it. If his declaration does not show such an interest, or such an interest is not legally implied from its allegations, he cannot prove his interest—nor does he show any right to recover.

To entitle a plaintiff to recover in trover, two things are necessary to be stated and proven: *First*, property, either general or special in the plaintiff; and *second*, a wrongful conversion.

In trover for a note, the omission to state in the declaration that the plaintiff was possessed of the note as of his own property, or that it came to the possession of the defendant by finding, would be fatal on general demurrer, but are probably cured by verdict.

But the introduction of such a receipt as is mentioned above disproves the plaintiff's title to the note, and establishes the interest of another in it; and consequently precluded a recovery.

Absent, RINGO, Chief Justice.

This was an action on the case. The declaration contained three counts. The first alleged that Sevier was an attorney, and that on the 14th day of November, A. D. 1825, Holliday caused to be delivered to him, and he then received and accepted a note of hand made by one Joshua J. Henness, calling for one hundred and thirty-three dollars, to bring suit on, recover and collect from Henness, for the use and benefit of Holliday, for certain fees, &c., but did not bring suit thereon; so that Holliday lost the debt.

The second count is, that on the same day, Holliday caused to be delivered to Sevier, attorney as aforesaid, "a certain other note for one hundred and thirty-three dollars, to him the said Ambrose H. Sevier, being such attorney as aforesaid, in a reasonable time then next following suit brought on it, and the said debt of \$133, as aforesaid, recovered and collected of, and from the said Henness, for the use and benefit of the said Holliday, for certain fees, &c;" that Sevier received the note and undertook to sue, recover and collect, but did not bring suit, so that the debt is lost.

The third count is in trover, for "a certain other note for \$133, made by Joshua J. Henness"—the proper goods and chattels of Holliday.

At September term, 1827, before HALL, Judge, the defendant filed a general demurrer, to the declaration, to which there was a joinder.

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At March term, 1828, before TRIMBLE, Judge, the demurrer was overruled, judgment for the plaintiff entered on the demurrer, and a writ of enquiry ordered.

At July term, 1828, the verdict was set aside, on affidavit of the defendant, the defendant filed his plea of not guilty; to which issue was joined, and a jury was called, who not agreeing were discharged; and the case continued.

At March term, 1830, to which time the cause was regularly continued, a second jury found a verdict for the plaintiff of \$168, 04½ cents damages; for which judgment was rendered.

On the trial the plaintiffs offered in evidence a receipt, of which the following is a copy :

“Received of Peter Holliday one note of one hundred and thirty-three dollars against Joshua J. Henness, drawn in favor of Wm. English. This 14th November, 1825. A. H. SEVIER.”

To the introduction of this receipt as evidence the defendant objected, but the court said that “it was evidence conducing to prove a privity of contract between the plaintiff and the defendant:” and so admitted it as evidence. To this the defendant excepted. No other evidence is stated on the record, nor is this shown to have been *all* the evidence.

The defendant then moved, in arrest of judgment, for divers defects in the declaration, and his motion was overruled.

The cause was then brought, by writ of error, to the Superior Court of the Territory, in 1830; and the following grounds of error were assigned:

1st. That the declaration is insufficient.

2d. Judgment for *Holliday*, when it should have been for *Sevier*.

3d. That it does not appear, in the record, to whom the notes therein mentioned were payable, whose notes they were, or that they or either of them belonged to or were the property of Holliday.

4th. That the consideration for the contracts made by Sevier, is not *formally* or expressly stated in the declaration.

5th. That the plaintiff does not show property in the notes, or where they were *converted* by the defendant.

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6th. The admission of the receipt in evidence, and the remarks of the Judge thereon.

After several arguments, no decision having been had, it was argued at July term, 1837, by

HALL, for plaintiff in error:

It is no where stated in either count of said declaration whose notes they were, nor to whom payable; nor is it stated that they, or either of them, belonged to Holliday. The two first counts do not state formally or expressly the consideration for the contracts therein mentioned, nor is there any venue laid as to the concession in the third count, nor is there any discrimination whether the notes mentioned in the first, second, and third counts, are the same or different. Demurrer to this declaration was overruled, and Sevier pleaded not guilty—and on the trial of the cause the court admitted the receipt of Sevier, given for a note payable to William English, to be given in evidence without proof of the plaintiff tested thereto, and instructed the jury that the receipt itself was evidence conducing to prove a privity of contract between Holliday and Sevier. The contract in the two first counts should contain a statement of the consideration in terms or in substance. See 1 *Chitty*, 368; *Idem* 296; as to the plaintiff's right to sue, see 1 *Chitty*, 3; 1st *Sanders*, 172; 10th *J. R.*, 387; as to the plaintiff's interest to the property, see 1st *Chitty*, 150.

TRAPNALL & COCKE, *Contra*:

The counsel for Sevier assign for the first error, that the declaration of Holliday is insufficient. The declaration is *good*, (but after withdrawal of demurrer, *admitting for argument* that it was bad,) the defects are cured, and cannot be taken advantage of in arrest of judgment. 2 *Marshall*, 143, 254, 496; 3 *Bibb*, 520, 521; 2 *Bibb*, 62; 1 *Bibb*, 257; 1 *Chitty*, and *Stephen on pleading*.

2nd assignment is general and without point, and of course signifies nothing. 1 *Bibb*, 505.

3rd assignment: That the declaration does not show to whom the notes were payable. The suit is not upon the note—but the declaration shows that the notes were owned by, and belonged to, Holliday,

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and that he made the contract and engagement with Sevier, and suit was brought for a violation of that contract or engagement.

4th: The consideration for the contract is not formally or expressly stated. The answer to the first assignment is conclusive to this—but the assignment is not true in fact or correct in law; the consideration is sufficiently stated, 3 *Bibb* 517; 1 *Saunders on pleading*, marginal page 164, and case cited; 2 *Chitty's pleading*, 373, and notes.

5th assignment: That plaintiff has not shown that said notes were his property, or where they were converted. To the first part of this, the remarks on the third assignment is a full answer. Notes pass by delivery as well as by assignment; and when one man holds a note drawn payable to another, and exercises ostensible acts of ownership over it, the presumption of law is, that it is as much his note as if it was assigned. The assignment only raises a presumption, but still the holder or assignee holds the note and acts upon it as if it was drawn payable to himself, and so did Holliday in this case—and he alledges in the declaration that the note is his, in all the counts. As to the second part, that there is no venue, the venue is alleged distinctly; and if it was omitted it was no error: 1st, because it was a matter of no importance, 3 *Chitty*, 279; venue not necessary, 13 *J. R.*, 449; 3 *Bibb*, 73; 6 *Comyn's Digest*, p. 53; 5 *Mass.*, 94. 2nd, the omission, if there was one and it was material, was cured by withdrawing the demurrer as well as by verdict and jeosails. 1 *Chitty*, 250.

6th assignment: That the court permitted the plaintiff to give in evidence to the jury a receipt given to William English without showing any privity of contract between plaintiff and defendant. The first answer to this assignment of error is, that it is not true in fact, for the receipt referred to is not given to Wm. English, but is given to Holliday the plaintiff; reference is made to the receipt for the correctness of this statement. The contract for the collection of the note was made by Sevier with Holliday, the possessor and legal owner of the note, and not with English—and so the privity of contract existed between Holliday and Sevier, and not with English, who had nothing to do with the business. The receipt shows that the privity of contract was between Holliday and Sevier, the receipt of Sevier himself, the defendant, and thereupon the court decided cor-

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rectly. Sevier admitted and acknowledged in his receipt, that the privity of contract was with Holliday, and, of course, that is sufficient and conclusive after the verdict. The record does not profess to state all the evidence; and therefore, after verdict, every thing is presumed as proved that is necessary to support it. 4 *Monroe*, 42; 1 *Bibb*, 308; 3 *Marshall*, 223; 1 *Marshall*, 101, 233; 2 *Marshall*, 197; 6 *Comyn's Digest*, 262; *Gould's Pleading*, 496, 498; *Roe vs. Haugh*, 3 *Salk*. 15.

7th assignment. That the judge instructed the jury that said receipt conduced to prove a privity of contract between plaintiff and defendant. The receipt of Sevier is given to Holliday; the contract was made with Holliday; and the violation of it, by Sevier, was to the damage of Holliday—and therefore the receipt not only conduces to prove the privity of contract, but absolutely proves the fact that the privity of contract was with Holliday, and no one else whatever.

The court not being satisfied what judgment to render, continued the case to January term, 1838, for further argument; and called the attention of counsel to the following points:

1st. Will a writ of error lie to reverse an erroneous decision upon demurrer?

2d. Does the record show all the proof adduced in the case?

3d. What is the legal presumption in favor of more proof, or is the record conclusive that the proof set forth in the bill of exceptions is all that was produced?

4th. What is meant by "privity of contract?" and do the words "conduce to prove," show that there was antecedent or subsequent proof in the case?

5th. Can any proof be given, to create a privity of contract, if such privity does not appear on the face of the writing declared on?

6th. To whom is the defendant liable? Could English sustain an action against him, after a recovery by Holliday?

7th. What is the difference between the practice in England and this country in relation to demurrers and the judgment thereon—and the reasons of the rule for such difference if any exists?

Upon which points, at January term, 1838, TRAPNALL & COCKE, for defendant in error, presented the following argument :

In answer to the points of argument made by the court, the counsel of Holliday respond to the first:

That after the withdrawal of the demurrer and entering of plea, arrest of judgment and writ of error are both estopped. 2 *Marshall*, 143, 254, 496; 3 *Bibb*, 521; *Stephen's Pl.* 327.

To the second: The record does not profess to give all the evidence, and the presumption of law is, that every thing requisite to the judgment has been proven. 2 *Littell*, 180, 184; 5 *Littell*, 317, 221.

To the third point: The presumption is just the contrary. When a record does not profess to state all the evidence more is presumed. See the same authority as in the second point.

To the fourth point: When two persons make a contract, such as between Holliday and Sevier, when Holliday confided the note and Sevier promised him, and gave his receipt to collect to Holliday, between them was the privity of contract. See 5 *Jacob's Law Dic.*, 7, 284; 1 *J. R.*, 91. "*Conduce to prove*" means to promote or contribute to prove, and shows there may have been antecedent or subsequent proof, and there is need of more proof. The record is conclusive as to the presumption that there was more.

To the fifth point: This is an action of case, and there is no writing but the writing declared on. The receipt of Sevier does show that he got the note from Holliday. The presumption of law and fact is, that he was the owner, and that *presumption* is not *contradicted* by any thing in the *record*.

To the sixth point: Sevier is responsible to the man with whom he made the contract, and to whom he gave the receipt; and this occurs every day. And who was the man? Holliday. Did Sevier make his contract or engagement to collect the note with English? No. Did he give the receipt to English? No. Then what right has English to sue him? He is not responsible to English upon any principle of law or common sense. The suit is for a breach of contract. With whom was the contract made? With English? Certainly not. Then what interest has he in the case?

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In reply to the seventh point: There is no difference between the practice of this country and England in relation to demurrer and practice there, save what has been made by the statutes of this State. There is no difference so far as this case is concerned, as far as the counsel knows, has ever heard, or believes.

The case of Gunn is conclusive authority for Holliday. A note passes by delivery, and therefore the holder as well as the assignee is presumed to be the proprietor; as a man in the possession of a horse or negro is presumed to be the owner; and that presumption, both of law and fact, continues until it is repelled by proof. Cantine gave this receipt to Gunn for the collection of the covenant, and therefore *prima facie* Gunn was the owner, although it was drawn payable to another person; but it turned out in proof affirmatively, that Gunn was not the owner of the covenant, but that it belonged to another—and he was therefore defeated, because the legal presumption was repelled by affirmative proof. In this case the legal presumption in *favor* of Holliday stands without a particle of evidence to the contrary on any thing upon which to rest an inspection to the contrary, and the legal inference from the record is, that the fact of his being the owner was established to the satisfaction of the jury.

The receipt in this case is a matter of evidence only, and is not a matter of record; and therefore the receipt does not come up before the court on motion in arrest of judgment. *Tidd's Practice*; 1 *Chitty*, head "*Arrest of Judgment*."

Nothing but what is matter of record can be considered by the court on this motion.

In addition: The 6th and 7th assignments are causes of new trial and not in arrest of judgment. The instruction of the Judge on matters of evidence, are not of record, and therefore a motion which reaches nothing but errors 'apparent upon the record,' will not reach the two last assignments. See 1 *Starkie*, title "*New Trial*;" and 1 *Chitty* and *Stephens*, title "*Arrest of Judgment*."

And at the same term, the court, by DICKINSON, *Judge*, delivered the following opinion:

We deem it unnecessary to decide the question in relation to the

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demurrer, because the party withdrew it and pleaded over to the action; nor are we disposed to disturb the rule that, whatever has been adjudged upon demurrer shall not again be re-examined upon a motion in arrest of judgment. This case, however, comes before us upon a writ of error. The whole record is open for inspection, and if there is any material error the court is bound to correct it. It is contended, on the part of Holliday, that inasmuch as the bills of exception do not set forth that the receipt offered was all the evidence before the jury, and that the word, "*conduced*," as inserted therein, means contributed, this court are bound to presume that there was other testimony which, in conjunction with the receipt, proved, sufficiently, the privity of contract. This reasoning, though in general good, will not warrant the conclusion in every instance. We are authorized to look into the whole record, and from the circumstances under which the receipt was admitted, and the language used in the bills of exception, to judge whether there was any other evidence adduced calculated to change the attitude of the parties in the question before us. We have directed our attention to this point, and are necessarily brought to the conclusion that there was not. The doctrine is clear that, in general, the action on a contract, whether expressed or implied, or whether by parole or under seal, or of record, must be brought in the name of the party in whom the legal interest is vested. Is there any evidence that the legal interest, at the time Sevier received the note, or at any subsequent period, was in Holliday? And does the receipt prove, or even conduce to prove, that he had either an equitable or beneficial interest? If, then, he had neither a legal, beneficial, nor equitable interest in the note, how is this privity raised? It is only by the one presumption that the note was received by him, repelled by the still stronger presumption that he was but an agent acting in the capacity or character of a bailee to carry it to Sevier. It is evident that Holliday had no legal interest in the note, and the principle is well settled, that a beneficial or equitable claimant cannot adopt legal proceedings in his own name. He must have an interest, or possession coupled with an interest. See *Chitty's Pl.* 1, 150; *3d C. P.* 2; *2 Taunton* 374; *6 Mass. Rep.* 356; *10 Johnson* 387; *11 J.* 23. We cannot discover that English had

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ever parted with the legal right. A suit, if commenced, must have been in his name. He might not only have released the claim, but payment to him would have been a good defence and resulted in a judgment in favor of Henness. We are, therefore, of opinion that the Circuit Court erred in the instruction given—that the receipt conduced to prove a privity of contract between Holliday and Sevier.

We will now examine into the third count in the declaration, which is in trover. To enable a party to maintain the action of trover, two things are necessary: First, property in the plaintiff; and, second, wrongful conversion in the defendant. The receipt of Sevier, introduced on the trial, shows, conclusively, that the property, as well as the right of possession, was not in Holliday. The presumption, then, from mere possession, must yield to positive proof, though that proof was inadvertently presented by the plaintiff. And this position is clearly sustained in the case of *Sheriff vs. Cadell*, 2 *Espinasses' Cases* 617. The doctrine that title in another is a good defence, is too well settled to be at this period disturbed. See *Kennedy vs. Strong*, 14 *Johnson* 128; *Schemerhorn vs. Van Vicklenburg*, 11 *Johnson* 529; 3 *Starkie*, 14, 87; 2 *Saunders* 47, 873-9; 7 *Term. Rep.* 12. Judgment reversed.

At the same term, TRAPNALL & COCKE, for defendant in error, presented the following petition for rehearing:

The counsel for Holliday respectfully ask of the court a reconsideration and re-argument of the cause. They have carefully examined the opinion pronounced by the court, and are confident it is founded upon a misconception of the grounds of this action. Believing as we do, in the anxious desire of the court to settle right all questions, either of law or fact, which they may be called to adjudicate, we feel the fullest assurance they will cheerfully correct errors, when convinced they have fallen into them. After an attentive examination of the argument of the court, and a mature investigation into the various questions involved in this cause, we retain a confirmed and strengthened conviction of the truth of the position we have assumed; and we are not without hope but what we can demonstrate to the satisfaction of the court, that which appears so evident to our own minds. As the court

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seem to regard the questions which arise in relation to the demurrer, and the motion in arrest of judgment, as furnishing no available grounds in favor of the plaintiff in error, we shall not bestow upon them any further consideration, but pass at once to those points which have mainly influenced the opinion of the court. The decision seems to us to be predicated upon the presumption that the note executed by Henness to English, and which Sevier received of Holliday for collection, is the basis of the suit. This opinion, with due respect, we conceive to be erroneous, and unsupported by any thing which appears on the face of the record. The declaration sets out with clearness and precision the grounds of this action, and we beg leave to incorporate that instrument in this motion, and solicit to it the special attention of the court. It is as follows:

“ Peter Holliday, plaintiff in this suit, by his attorney, complains of A. H. Sevier, of a plea of trespass on the case. For that, whereas, the said A. H. Sevier, before, and at the time of the delivery of the note to him as hereinafter next mentioned, was, and thence hitherto has been, and still is an attorney of the Supreme Court and Circuit Courts of this Territory. And whereas, also, the said Peter Holliday, whilst the said A. H. Sevier was such attorney as aforesaid, to wit, in the county of Clark, and within the jurisdiction of this court, on the 14th day of November, A. D. 1825, caused to be delivered to him, the said A. H. Sevier, and the said A. H. Sevier accepted, and then and there received of and from the said Peter Holliday, a certain note of hand, made by one Joshua J. Henness, calling for \$133, to bring suit on, recover and collect from the said J. J. Henness, for the use and benefit of the said Peter Holliday, for certain fees and reward to him, the said A. H. Sevier, in that behalf, Yet the said A. H. Sevier, not regarding his duty as such attorney as aforesaid, but contriving, and fraudulently intending craftily, and to defraud and injure the said Peter Holliday in this behalf, did not, nor would not bring suit on, and recover and collect the said note for \$133, for the use and benefit of the said Peter Holliday: but on the contrary thereof, he, the said A. H. Sevier, being such attorney as aforesaid, so carelessly and negligently behaved and conducted himself in the premises, that by, and through the careless-

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ness, negligence and default of the said A. H. Sevier, the said \$133 have been, and are wholly lost to the said Peter Holliday, to wit, in the county of Clark aforesaid.

And whereas, also, heretofore, to wit, on the 14th day of November, 1825, at the county, and within the jurisdiction aforesaid, the said Peter Holliday caused to be delivered to the said A. H. Sevier, attorney at law, as aforesaid, a certain other note for \$133, to him, the said A. H. Sevier, being such attorney as aforesaid, in a reasonable time then next following, to bring suit on it, and the said debt of \$133, as aforesaid, recovered and collected of, and from the said J. J. Henness, for the use and benefit of Peter Holliday, as aforesaid, for certain fees and reward to the said A. H. Sevier in that behalf; and although the said A. H. Sevier, attorney as aforesaid, then and there accepted, and had and received the note aforesaid, for the purpose aforesaid, and undertook to bring suit on the note aforesaid, and to collect the \$133, aforesaid, and although a reasonable time to bring suit on, and recover and collect the \$133, as aforesaid, hath long since elapsed, yet the said A. H. Sevier, being such attorney as aforesaid, and not regarding his duty in that behalf; but contriving, and fraudulently intending, and to deceive and defraud the said Peter Holliday in this respect, did not, nor would not, within such reasonable time, as aforesaid, or at any time afterwards, although often requested so to do, bring suit on said note, recover and collect the \$133, aforesaid, from the said J. J. Henness, as aforesaid, but hath, hitherto, wholly neglected and refused so to do; and by means of the negligent and improper conduct of the said A. H. Sevier, in that behalf, the \$133, aforesaid, have not been recovered and collected, and are wholly lost to the said A. H. Sevier, to wit, at the county aforesaid. And whereas, also, heretofore, to wit, on the 14th day of November, 1825, the said Peter Holliday, at the county, and within the jurisdiction aforesaid, was possessed of a certain other note for \$133, made by J. J. Henness, and being so possessed thereof, which same note, thereafterwards, on the same day, came to the possession of the said A. H. Sevier, yet the said A. H. Sevier, well knowing the same to be the proper goods and chattels of the said Peter Holliday, and of right to appertain to him, though requested, hath not delivered the

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same to the plaintiff, but thereafterwards, on the same day, converted the same to his own use, to the damage of the said Peter Holliday two hundred dollars; and therefore he brings suit."

We ask the court to examine this declaration again, and we think it must be apparent, from the whole tenor of it, that the cause of action is the failure of Sevier to fulfil his engagement, in his character of an attorney, made with Holliday, and to recover the damages he, Holliday, may have sustained from the breach of that contract. The note was only referred to by way of inducement or explanation. It was the subject matter in regard to which the contract was made, and of course the contract itself could not be set out without referring to it. But it is, clearly, not the foundation of this suit. It is true that the equitable owner of a note cannot prosecute a suit against the obligor in his own name, but he must use the name of him in whom the legal interest resides; but when the equitable owner employs an attorney, and binds himself to give him certain fees to prosecute and secure that interest, he is, to that contract, a legal party, and is legally entitled to all the damages he may sustain by its violation. The interest in the contract and the interest in the note are distinct and separate, and the relation in which the equitable owner of the note stands to the obligor in the note is altogether distinct and different from that in which he stands to the attorney with whom he has made the contract for the prosecution of the suit. Had this important distinction been kept steadily in view by the court, we believe the result of this cause must have been materially different. It is owing to this misconception that the court lay down the principle, (right in itself; but not applicable to this action,) "that a beneficial or equitable claimant cannot adopt legal proceedings in his own name." Had Holliday brought suit, in his own name, on the note to enforce the collection of Henness, then the doctrine insisted upon by the court would have been directly applicable. He must have instituted it in the name of English, in whom the legal interest was vested, and not in his own. The court will remark that this action is not upon the note to compel its payment by Henness, but upon the contract between Sevier and Holliday, to recover the damages sustained by the latter by failure of the former to perform his undertaking. To this contract

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between the attorney and his client, Holliday is not an equitable, but a legal party; the rights and interests he may have arising out of the contract are legal and not equitable.

It is by improperly complicating and blending together Holliday's interest in this note with his interest in the contract with Sevier, that the court have arrived at the mistaken conclusion that Holliday's interest in his own contract, made by himself, and for himself, is a mere equitable interest. Holliday's interest in this note, and in the engagement with Sevier, are distinct interests, relating to different parties; involving different liabilities, and falling under different rules of legal construction. Holliday and Sevier were parties competent to contract; the subject matter was one in regard to which they had a right to contract; and that they did actually do so, is alleged in the declaration. Is it not, then, manifestly incorrect to say that Holliday can only obtain redress by the use of English's name, for the breach of an engagement, made directly to himself, for his own benefit, and to which engagement there is no evidence that English was a party, or in any way concerned? It is true, to enable Holliday to recover damages upon the trial below, against Sevier, he must have proven that he was entitled to the avails of this note, and that he lost it through the negligence of Sevier. Whether Holliday was or was not entitled to the proceeds of this note is a question of fact to be decided by the jury upon the evidence adduced before them. If he proved that he was entitled to it, and that it might have been recovered, had Sevier prosecuted the suit against Henness in fulfilment of his undertaking, the amount of the note would be the criterion by which the jury would be governed in assessing the damages against Sevier. But if, on the contrary, Holliday failed in proving any interest in the note, any loss by Sevier's delinquency, the jury could not have given him a verdict of damages; for having suffered no injury, he could claim no compensation.

The question then is, is there any thing in the record to repel the presumption that Holliday did adduce proof before the jury establishing to their satisfaction this contract with Sevier, and the injury sustained by his failure to comply with the undertaking on his part? Before discussing this question, we would premise that we are led to

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infer, as well from particular passages in the opinion, as from its general tenor, that the court, in examining the record in this cause, have looked to it more with a view of ascertaining whether it contains full and ample testimony of all the facts necessary to establish our demand, than with a view of ascertaining whether it furnishes, in itself, conclusive evidence that the jury and court below erred. This distinction is material, and exercises an important influence upon the practical result of this cause.

If the court, in the investigation of this subject, have proceeded in any degree under the belief that it was necessary to entitle us to an affirmance of the judgment below, that our claim, and the evidence adduced in support of it, should be shown on the record before this court, with all the fulness and precision requisite to establish it in the first instance before the inferior court, we would then say that such a rule, according to our understanding of the authorities, is in direct violation of those principles of practice which have been long and well settled in the courts of England, and in our own country. The rule is firmly fixed, that the party who impeaches the validity of the judgment below, must show, affirmatively, on the record, such facts as prove conclusively that the court erred, or the appellate court will presume its judgment to have been correct. See *Hodges vs. Biggs*, 2 Marshall 222, Com. Dig. Ul.; 1 Peters C. R. 326. An appellate tribunal never presumes any thing in favor of him who arraigns the justice and legality of the judgment below. They will even presume the court and jury have done right until the contrary appears. The attitude of the parties before this court is materially changed from what it was before the circuit court. There the *onus probandi* was upon Holliday; he was bound to furnish to the court and jury such proofs in support of his claim as would satisfy them of his legal right to recover. He did so. Sevier, in appealing from that decision, takes upon himself the *onus probandi* before this court. He, as plaintiff here, must establish, not by presumption and conjecture, but by a direct and positive showing, that the judgment was illegal and unauthorized, before he can overthrow it. Has he done so? We confidently affirm not; and the court can only arrive at that conclusion by presumption in favor of Sevier, (who has now no right to their favor

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in this respect,) and that too, as we firmly believe, not warranted by any thing in the bill of exceptions. The court say, "we are authorized to look into the whole record, and from the circumstances under which the receipt was admitted, and the language used in the bills of exception, to judge whether there was any other evidence calculated to change the attitude of the parties in the question before us. We have directed our attention to this point, and are necessarily brought to the conclusion that there was not." What those "circumstances" were, and what the "language used in the bills of exception" which "necessarily brought the mind of the court" to this conclusion, they have not thought proper to specify. This is a point of the very first importance in the decision of this cause, and it is difficult to remove objections stated in terms so general and indefinite. We have examined the bills of exception with all the critical acumen with which we are endowed, and can see nothing in "the circumstances under which the receipt was admitted," and nothing in the language of these bills to warrant the inference that there was no other evidence in the cause calculated to change the attitude of parties in this question.

We beg leave here to insert those bills of exception, with such remarks as we deem necessary to place them in their true light in this cause. They are as follows:

"Be it remembered that, upon the trial of this cause, the plaintiff offered, in evidence, a receipt, the signature to which was proved to be in the hand writing of A. H. Sevier, in the words and figures following, to wit:

"Received of Peter Holliday one note of one hundred and thirty-three dollars against Joshua J. Henness, drawn in favor of William English. This 14th November, 1825. A. H. SEVIER."

"To which evidence the defendant objected, and the court overruled the said objection, and admitted said receipt to be given in evidence to the jury; to which opinion of the court the defendant excepts, and prays that his bill of exceptions may be signed, sealed, and enrolled."

2d bill. "Be it remembered that, on the trial of the above suit, the counsel for the parties in the suit having differed in their state-

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ments of the opinion given by the court as to the receipt executed by the defendant, the court said that the receipt was evidence conducing to prove a privity of contract between the plaintiff and the defendant; to which opinion of the court the defendant, by his counsel, excepts, and prays that his bill of exceptions may be signed, sealed, and made a part of this record."

The first bill contains nothing more than an exception to the admission in evidence of the receipt given by Sevier to Holliday. The second contains nothing more than an exception to the instructions of the court in regard to the legal effect of the receipt, and from this the court draws the inference that there could have been no other material evidence in the case. How an exception to the admission of a single fact, and the instructions of the court in regard to the effect of that fact, can close the door upon all presumption that there was other material evidence in the cause, we cannot perceive. We would emphatically ask how and in what way it is that an exception to a single fact necessarily excludes the presumption of more testimony, when the bill of exceptions does not say it contains all? Does not the experience of every day's practice conclusively refute such a supposition? An objection is only made to the admission of testimony when the party objecting denies that it is legally pertinent to the issue. But where the evidence is obviously legal, and relevant to the issue, bills of exception are never taken. And will the court say, because the counsel for Sevier objected to the introduction of this receipt, as illegal evidence and irrelevant to the issue, that it must "necessarily" follow that Holliday did not and could not introduce any that was. With due deference to this court, we would suggest that such a conclusion would reverse the well settled law of presumptions, which are always indulged in favor, and never against the verdict and judgment below. The only object sought to be obtained by the plaintiff in error, in taking those exceptions, was to test the question whether or not this receipt was legal evidence to the jury. This is the only question to which it can legitimately give rise. The court have, however, given it a different effect, a broader operation, and raised upon it the presumption "that there was no other evidence calculated to change the attitude of the parties in the question before them." We

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will, however, waive, for the present, any further discussion of this branch of the subject, that we may take up, in an orderly and methodical manner, the questions which arise out of these bills of exception.

The first is, did the court err in admitting this receipt in evidence?

Second. Did the court err in regard to the effect of the receipt?

And thirdly. Does the language of the bills of exceptions preclude the presumption that other evidence was adduced on the trial below?

In discussing the first proposition it is necessary that we should again direct the attention of the court to the objects of this suit; to the basis on which the action is founded; and to the relationship existing between the parties to it. This is an action on the case for the tortious breach of a contract made between Holliday and Sevier, and to recover the damages Holliday asserts he has sustained by the failure of Sevier to perform that contract. It is not to enforce the collection of the note of Henness, but to make Sevier responsible, upon his own contract, for failing to do that which, "for certain fees and rewards," he had obliged himself to Holliday to do. This contract, then, is the basis of this action. It is the tie which binds the parties together, and establishes that privity and relationship between them which give to the one a remedy against the other for any breach thereof. It was necessary, therefore, to enable Holliday to maintain his action, that he should, upon the threshold of the trial, prove the existence of this contract; without this proof he could not advance one step in the progress of his suit. That point was first to be established before he could enter on the question of damages. What, then, are the terms and nature of the contract which Holliday alleges he made with Sevier, and for the breach of which he instituted this suit? It is distinctly set out in the declaration in the following words: "A. H. Sevier accepted and received of and from the said Peter Holliday a certain note of hand made by one Joshua J. Henness, calling for one hundred and thirty-three dollars, to bring suit on, recover and collect of and from the said Henness, for the use and benefit of the said Peter Holliday, for certain fees and rewards." This receipt was introduced as evidence conducing to prove this contract,

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and the privity between the parties. The question then is, does it so conduce? If it does, the court were clearly right in admitting it in evidence, and in the instructions they gave the jury in regard to it. By this receipt Sevier acknowledges that he received of Holliday a note on Joshua J. Henness for \$133. Neither the court in their opinion, nor the plaintiff's counsel in their argument, have ever doubted for a moment but that the note alluded to in the declaration was the same for which the receipt was given. If so, does it not establish a material part of the contract set out in the declaration, one of the essential parts of which is that Sevier did not receive this note of Holliday? If, then, he had failed to prove this fact, he would not have made out his contract, and Sevier could not have been made responsible. The omission of so material a circumstance would have been seized upon by the learned and astute counsel for Sevier, and turned upon us with fatal effect. Since this, then, was an important fact to be proven, what better evidence could there be than the written acknowledgment of Sevier himself? It is proof of the most direct and positive character. And if the court erred in their instructions, it was not in violation of the rights of Sevier, but of Holliday, in giving to this receipt a more limited effect than of right belonged to it. If this receipt proves, as we think we have demonstrated it does, a fact material to make out the contract in support of this action, the correctness of the instructions given by the court follow as a necessary consequence. The terms used by the court in conveying those instructions show the Judge was fastidiously cautious in not giving to the receipt too strong an effect upon the minds of the jury. He merely says that it conduces to prove a privity of contract; evidently implying that it was not conclusive evidence of the facts, and that more proof was necessary to establish this privity conclusively. Since, then, the jury found for Holliday, is not the inference strong that additional testimony was adduced, which did satisfy them of the privity of contract between the parties? It is, however, insisted, inasmuch as the receipt shows the note was drawn payable to English, and not to Holliday, that the action against Sevier should have been brought in the name of English. If this was an action against Henness, founded upon the note, this principle might be correct, but it

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can certainly have no application to this case. Holliday is not here suing upon a contract made by English. He is suing upon his own contract, and seeking redress for an injury done to himself, and not to English. Will the court say that Holliday has no right to institute a suit in his own name, upon his own contract? That he must resort to the name of English to obtain a remedy for the breach of an agreement to which English was no party, and in which he had no interest? I again repeat, and hope the court will bear the distinction in mind, that although the interest of Holliday in the subject matter, in regard to which the contract was made, may have been only equitable, yet the interest in the contract itself is purely legal, and he has a legal right to the damages sustained by the non-performance of it. This note forms no part of the consideration for the contract between the parties. The professional skill of Sevier on the one hand, and the fees and reward to be given by Holliday on the other, form the consideration on which the contract is founded. If Sevier withheld those services, whereby Holliday was greatly injured, has he no remedy? We believe, upon a careful revision of this cause, the court will perceive that the principles of law relied on by them, and the authorities cited, relate alone to the suit against Henness on the note, and cannot apply to the facts before them. Let us illustrate the case by an example, which may relieve the case of all embarrassment, and present its true points in a simple and tangible form. A gives his note to B for \$100; B, being unwilling to endorse the solvency of A, sells it to C, and passes it without assignment; A refuses to pay, and C contracts with a lawyer for the collection. The court, if we rightly understand the effect of their decision, establish the principle that C cannot sue the lawyer for a breach of this contract made with himself alone, but that the suit must be instituted in the name of B, who has the legal interest in the note. Is it not evident that they constitute two different engagements, between two different parties, to which different liabilities attach? The privity of contract is between C and his lawyer. He has engaged his services, and the duty to be performed is for his benefit. Suppose, for a moment, the lawyer had performed his duty and discharged his obligation, to whom would he look for his fees? To B? Certainly not; for B has made no contract

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with him, and has no interest in the services to be performed by him. The contract was with C. The contract to pay for his services was made by C; and if he failed to do so, the attorney would have a right of action to compel the payment. Although the lawyer would have his legal redress against the client for a breach of the contract, yet, by the decision of the court, the client would be without his remedy against the lawyer, unless, forsooth, he would institute his suit in the name of another no way connected with the transaction. Such a rule would at once destroy that reciprocity which accompanies all contracts, and constitutes a part of their very essence; the reciprocal obligation is at once severed, and a redress given to the one party for a violation of their mutual agreement, which is denied to the other. This surely cannot be consistent with the spirit of the law, which, in its stern and unbending justice, knows no partialities, and respects no persons.

We will now proceed to the third question. Does the language of the bills of exception preclude the presumption that other evidence was introduced on the trial below? We say it does not. The bills of exception do not profess to set out all the evidence in the cause. The exceptions are confined to the admission of a particular paper in evidence, and the correctness of the instructions of the court as to the effect of that paper. They no where assert that this was all the proof, nor have we been able, after the most careful and anxious examination, to trace one single line which conveys even a distant intimation to that effect. A single fact is excepted to, and the court say it excludes all presumption of more proof. To create this presumption, the bills of exceptions must not only set forth all the testimony, but must, in addition, expressly declare on its face that it has done so. In *Frazier vs. Harris*, 2 *Littell*, 182, the principle here asserted is broadly laid down; the language is, (we quote from the margin,) "when a bill of exceptions to the decision of the inferior court, refusing to give to the jury the instructions asked, does not state that the evidence detailed in the bill of exceptions was all the evidence given, the Court of Appeals will presume that other evidence, and sufficient to justify the decision of the inferior court, was given." In 5 *Littell*, 221, *Smith vs. Morrow*, the same principle is affirmed. In the case of *Fonk vs. Darnell*, page

317, of the same volume, the court say, "we observe the bill of exceptions here taken, although it gives us a long history of the testimony, does not declare that it contains the whole of it, and therefore we cannot presume that the court below did wrong." Were it necessary, we might multiply authorities on this point; those to which we have referred bear directly upon it and are conclusive. In the case last cited, the bill of exceptions gives a long history of the testimony, but because it did not declare it contained the whole, the appellate court refuse to admit the court below did wrong. The bills in the case before us only set out a single fact, and nowhere assert that this was all; yet the court declare they are necessarily brought to the conclusion there was no more; and upon this ground reverse the judgment below. We ask the court to pause and carefully review their decision, with the light of those authorities beaming upon it, and we feel convinced they will correct the error into which we are constrained to believe they have fallen. We trust the court will not disturb and unsettle principles so long and firmly engrafted into our system of judicial practice. Innovations upon established rules should ever be cautiously made, and never unless experience has proven them to be unjust and oppressive. But the rule which we respectfully conceive the court have violated in this instance is as strongly recommended by good sense and sound policy as it is clearly supported by precedent and authority. Bills of exception, being always signed and certified by the Judge before whom they are taken, if they declare on their face they embrace all the evidence, the appellate court can act with a full assurance that they have all the facts before them, and if error has been committed they can rectify it. But where they have not this assurance they cannot know that all the facts are reported, and they will not, therefore, take upon themselves to say that the judgment was wrong; for the proof, from all they can know, may have been amply sufficient to warrant the finding of the jury and the judgment of the court. The firmly established rule of law, recognized by the highest English and American authorities, is, that the court, after verdict, will presume every fact to be proven, necessary to establish the plaintiff's demand. "After verdict," says *Chitty*, page 404, margin, "if the issue joined be such as necessarily to require, on the trial, proof

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of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the Judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by verdict at common law ; in short, the court will infer almost any thing after verdict." Now what is the issue joined here, and what proof would be necessarily required on the trial to warrant the Judge in directing the jury, or the jury in giving a verdict for Holliday ? The declaration sets out a contract between the plaintiff and defendant, by virtue of which the latter agreed to accept, and did receive of the former, a note on J. J. Henness for \$133, to collect for his use and benefit, and asserts defendant did not comply with his engagement, whereby plaintiff was damaged, &c., &c. To this, Sevier has pleaded not guilty, which puts directly in issue each one of those facts. To enable the plaintiff, then, to recover, he must have proven, first, the existence of the contract as alleged ; 2ndly, that this note was actually passed to Sevier ; 3rdly, that it was to be collected for his benefit, and that he was the person who had actually suffered the damage. All these circumstances, the court must now presume, were proven ; they are material to the issue joined, and without proof of them it cannot be supposed the Judge would have directed, or the jury have given a verdict for Holliday. For further authorities in regard to presumptions after verdict, we refer the court to 1 *Peters C. R.* 326 ; 1 *Marshall* 106 ; *Comyn's Digest* ; 2 *Marshall* 254, and 222. In the latter case, the principle upon which the court acted, is, "that the party excepting, should spread the testimony on the record ; failing to do so, every intendment will be indulged in favor of the judgment below." In *Roe vs. Haugh*, (3 *Salk. p.* 15, *marg.*) the court expressly say, "they ought to do what they could to help the verdict." We would now respectfully ask the court, have they, in their decision, given to us the benefit of these presumptions, to which all the authorities, in the most decisive and emphatic language, declare we are entitled ? Have they done what they could do to help the verdict ? After a careful examination of their decision, we are constrained to say, we believe they have not ; on the contrary, we cannot but regard their decision as resting upon a series of presumptions against the verdict, neither authorized by the rules of law

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or any thing contained in the record. The court ask, "is there any evidence that the legal interest, at the time Sevier received the note, or at any subsequent period, was in Holliday?" Since the bill of exceptions does not contain all the evidence, how is it that the court draw the inference that no such proof was made before the jury? The legal presumptions, we have shown, incline the other way. The receipt only shows that the note was drawn by Henness, payable to English; this might be true, and yet Holliday might have adduced evidence, on the trial, of an assignment; this supposition is not at all repugnant to, or inconsistent with the fact stated in the receipt. While it is fortified by the fact that Holliday was in possession of the note; that he contracted with Sevier for its collection, and was responsible to him for his fees; and that Sevier receipted directly to him and not to English for it. Again, the court say, "does the receipt prove that he had either a legal or beneficial interest?" Is it not here again obvious that the court are limiting our evidence to this receipt, and denying us the benefit of those legal presumptions, which now of right belong to us? The counsel for Sevier has omitted, in his bills of exception, the evidence we adduced in support of this branch of our cause, and are we to be prejudiced by his omissions? If the proofs we adduced did not establish this fact, why did he not report it? This court could then have judged of its sufficiency. Having failed to do so, this court will now presume it was sufficient, since the court below have decided it to be so. The bills of exception prove that the receipt was introduced, not to prove the nature of Holliday's interest in the note, but to establish the privity of contract between Sevier and Holliday. That it did establish the privity, and fulfil the purposes of its introduction, we think we have already sufficiently demonstrated. The receipt should, therefore, not be held responsible for not proving a fact, it was never introduced to prove; nor can we, by any process of sound reasoning, be concluded from the presumption of proof establishing other points, because the defendant has thought proper only to except to, and report the evidence upon, one.

The question is, is the receipt so directly repugnant to the supposition of a legal or beneficial interest in Holliday to the note, as to exclude, necessarily, all presumption of proof supporting these facts?

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We have shown it is not. And the court, instead of presuming against the verdict, should do what they could to help it. The legal intendment is, that every fact necessary to support the verdict was proven on the trial. We again repeat that, unless Holliday adduced evidence of either a legal or equitable interest in the note, he could not have recovered against Sevier. The jury could not have given him a verdict for damages, unless he proved some injury sustained. The court proceed to say, "if, then, he had no legal, beneficial or equitable interest in the note, how is the privity raised?" But how, we would ask, does the court arrive at the conclusion that Holliday had no legal, beneficial or equitable interest in the note? The court does not inform us, and we believe there is no portion of the record that would sanction this deduction upon any principles, or just legal construction. Suppose we concede, for the sake of the argument, that the bill of exceptions contains no evidence that Holliday had either a legal or equitable interest, will that justify the court in assuming that no such testimony was given on the trial? The bills of exception do not state that they contain all the evidence; and the rule in such a case, is that the court will infer there was more proof.

The books say, after verdict, the court will presume almost every thing in favor of the verdict; that they will do what they can to help it. Yet the court here cut us off from all those presumptions, and transfer them to the other party; who, by no rule of law, is entitled to them. The court go on to say, "it is only by the one presumption that the note was received of him, repelled by the still stronger presumption that he was but an agent, acting in the capacity or character of a bailee, to carry the note to Sevier." The court having, by interrogatories and assumptions, arrived at the decision, that Holliday had no legal or beneficial interest, they continue to pursue those presumptions until they reach the conclusion that he was a mere bailee to carry this note to Sevier; but by what evidence in the cause this fact is established, by what process of reasoning this conclusion is made out, we confess we are unable to perceive. We would respectfully ask the court, is it true that, to establish Holliday's legal or beneficial interest in this note, we have only "the one presumption, that it was received of him?" On the contrary, we believe there are many other

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and conclusive legal presumptions in our favor, founded upon rules of practice which have become fixtures in our system of jurisprudence, and recognized and acted upon by all the courts in every country where the common law prevails. In addition to the presumptions conceded to us by the court, we have the presumption of more proof before the jury, since the bill of exceptions does not declare that it contains all. We have the presumption, arising from the fact, that when Sevier received this note, he receipted directly to Holliday for it, and not to English. We have a right to all these presumptions, after verdict; which the court are bound to make in support of the verdict. We have a right to expect the Supreme Court will presume in favor of the judgment below, unless it is shown, affirmatively, on the record, to be wrong. Under these two last heads, we have a right to raise presumptions in favor of the proof of each individual fact upon the trial, necessarily required to authorize the Judge to direct, or the jury to give, a verdict for us.

Other courts "will infer almost every thing after verdict, and expressly declare they must do what they can to help it." But this court, unless we have mistaken the effect of their decision, seems to have acted on the principle, that they ought to infer every thing against the verdict, and reverse, unless it appears, affirmatively, on the record to be right. Does the record show any equitable considerations in favor of Sevier, which should induce the court to relax those rules to shelter him from liability? We affirm it does not. We have the evidence of twelve sworn jurors. We have the judgment of the court, that the testimony on the trial proved Sevier to have violated his contract, and that Holliday had, in consequence thereof, entirely lost the amount of this note. This court has not all the evidence before them, upon which the court and jury below predicated their judgment, and will they presume it all wrong? That Holliday was a mere bailee, without any legal or beneficial interest? Although the jury found damages for Holliday and the court approved their verdict? Yet we are, in substance, told the presumption must now be that the proof before them showed that English, and not Holliday, was the person damnified by the delinquency of Sevier. If this receipt, *ex vi termini*, operated as an estoppel against Holliday; if, in

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its terms or legal effect, it directly and positively precluded all supposition of farther evidence before the jury, and excluded Holliday from adducing evidence to show a legal or equitable interest in the note, the court might then plausibly infer that the door to all these presumptions was closed upon us finally and forever. But the receipt does not do this. Its terms are not inconsistent with, or opposed to the supposition of evidence establishing Holliday's property in the note. Although it was payable to English, it may have been assigned to Holliday, or he may have acquired, by its delivery, a right to its proceeds; the two facts may co-exist and both be true. If the law was, that a note drawn by one person in favor of another, could not be assigned, or in any way transferred to a third, so as to vest in him a legal or equitable interest, then the presumption for which we contend would be repugnant to the fact disclosed by the receipt, and the court would do right in excluding them. But this, the court well know, is not the law of assignments. The court again say, "it is evident Holliday had no legal interest in the note, and the principle is well settled, that a beneficial or equitable claimant cannot adopt legal proceedings in his own name." But is he not a legal party, and has he not a legal interest in his own contract, made with Sevier? Is it not manifest that the court are again blending this action against Sevier for a tortious breach of his own contract with Holliday, with the suit on the note against Henness, and applying to the former the rules of proceeding which belong alone to the latter? We have, in another part of this argument, labored to dissolve the connection between these suits, and to show the attitude in which the parties respectively stand in regard to them; and again beg leave to impress upon the court the importance of maintaining this distinction. The court say, "we cannot perceive that English had ever parted with his legal right." Is there any thing to show he has not? And is not this suggestion evidently predicated upon the ground that the court ought to presume every thing for Sevier, and against the verdict? The bills of exception here are the plaintiff's bills; and admit, for the sake of the argument, he has incorporated into them all the evidence on the trial, it was his duty to have shown that fact, conclusively, on the face, or expose himself to all the presumptions, to his prejudice,

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which the fixed rules of law would raise against him. But the omission and mismanagement of plaintiff's counsel, in this respect, has been visited upon us by the court, and not upon the party upon whom it should rightfully have fallen.

There is another important consequence that must result from the decision of the court. If English should institute a suit, (and the court intimate he is the proper person to do so,) he would have to prove that Holliday was his agent in making the contract with Sevier, and that he had never parted with the note. Now the court are bound to presume, as we have shown, in support of the verdict, that it was proven that Holliday made the contract for himself, and not for English; and that the injury, by the breach thereof, was to him and not to English. If these facts were proven, English would be defeated in his action, and the result would be this, Holliday could not recover because he held only an equitable interest in the note, and English could not recover because he had made no contract with Sevier, and there was no privity between them; and Sevier, although undeniably liable for the breach of his contract, as established by the verdict of twelve honest men and the judgment of the court, would be shielded from all legal responsibility.

In the conclusion of their opinion, the court take up the count in trover, and assuming that the receipt was all the evidence in the case, they argue, from thence, the plaintiff had no right to recover on this count. The law laid down by the court will not be controverted. That on this count two things must be proved: 1st, property in the plaintiff; 2d, conversion by the defendant. In this count the court will remark, that the plaintiff is not suing to recover the proceeds of the note, but the note itself, the mere paper. If English did transfer it to Holliday, either by a written assignment or by a mere delivery, he has clearly a legal right to the possession, and can maintain this action to regain it. The intendment of law is, as we have again and again shown, that this transfer was made. Without having all the evidence of the jury before them, would it not be a reflection upon the jury and court below for this court to presume that the one would give a verdict and the other a judgment against Sevier, and in favor

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of Holliday, who, himself, shewed, upon the trial, that he had neither the property or right of possession. Some respect is certainly due to the intelligence and integrity of the constituted authorities of the country; and where this court have not before them all the lights, by which their judgment was directed, they should ever presume they have discharged their duties aright. As to the claim against Henness, Holliday's interest may have been an equitable one, but as to the paper itself, he had a legal right, and therefore could maintain his action.

We are conscious that we have protracted this argument somewhat beyond the usual length. Believing, as we do, that the decision of the court is in violation of well established principles of law, and subversive of the rights and interests of our client, we have not been willing to abandon this cause without one more earnest effort; and we trust, that after the court have given to the questions, here involved, a mature and careful revision, this effort will not have been made in vain.

For further authority in regard to presumptions, after verdict, we refer to the case of *Fisher vs. Eason*, 1 Ark. 90.

And the prayer of the petition being granted, and the case opened for argument, it was argued at this term by

PIKE, for plaintiff in error:

The defendant in error contends that all the defects in the declaration were cured by the withdrawal of the demurrer to it, after its being overruled—that if not so, still all the defects are such as are cured by a verdict—and that the court below was right in admitting the receipt, and stating that it conduced to prove a privity of contract between Sevier and Holliday—and the court having admitted the two first positions in his favor, and decided against him in the last, he now claims a rehearing.

In order to ascertain whether the decision of this court be correct, we propose to examine all the questions legitimately presented by the record. In doing so, we shall pass by many questions heretofore argued in the case, and admit many positions heretofore disputed, and

attempt to show that the declaration in the case is so defective that no *general* verdict can be sustained upon it.

The case has been long before this court, so long that it hath the aspect of antiquity. Justice would be mocked at for its delay, if it were longer continued upon the records of this court undetermined. It hath long sustained here a precarious existence, and being now on the verge of dissolution, let its obsequies be decently performed.

And if it should appear, or seem probable, (for appear it cannot,) that the defendant in error ought in justice to have recovered from Sevier, but has failed, or must fail, because his attorney did not present his demand by a competent declaration, the law will not be blamed, nor will this court.

The first question presented, therefore, is, what effect was produced upon the defendant's case, by his withdrawal of his demurrer, after it was overruled by the court below? An examination of this question will, of course, include an exposition of certain principles, which the court, in deciding this case, held it unnecessary to enunciate or apply to the facts, having decided upon another point.

The doctrine laid down by the counsel for Holliday, in their original brief, is unquestionably correct, as quoted from *2 Tidd*. 825, that "after judgment on demurrer there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer." And the reason assigned is no less cogent, and consistent too with the uniform principles of the common law. It is that "the matter of law having been already settled by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiae* and tell them that the judgment which they gave on mature deliberation, is wrong." The meaning of the reference to any person coming as *amicus curiae*, is, that at common law, after verdict, the defendant had a day given him to move in arrest of judgment; and if, at such day, he made default, then any body, as *amicus curiae*, might move in arrest of judgment such matter as the party himself might have pleaded. *Smith vs. Harmon*, 6 *Mod.* 143; see *Edwards vs. Blunt*, 1 *Str.* 425.

The Kentucky courts have decided also, in broad and sweeping terms, that a withdrawal of a demurrer supersedes the judgment upon

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it, as completely as if it had never been filed, or a judgment given thereon. *Trigg vs. Shields, Hardin*, 169; and that where a defendant withdraws his demurrer, and pleads over, he waives his right to insist upon the error in overruling the demurrer. *Stockdon vs. Bayless*, 2 *Bibb*, 62.

It may be doubted whether the principle so broadly stated in these cases is correct to its whole apparent extent; and whether, as stated, it has that accuracy and certainty which render judicial decisions valuable as guides for other courts. Taking it according to its strict letter, as enunciated by the Kentucky courts, and so it is interpreted and applied by the counsel for Holliday in this case, and it means that no matter how defective the declaration may be, no matter if in it the plaintiff shows no title or right of action whatever, still, if the defendant demurs to it, and, his demurrer being overruled, withdraws it, he is utterly precluded, first, from moving in arrest of judgment for any defect in the declaration; and second, from having any benefit of the error of the court below in giving judgment against him upon such a declaration. This certainly is a most singular doctrine, and a conclusion not to be arrived at, unless for reasons exceedingly stringent and binding upon the court.

What effect ought the withdrawal of a demurrer to have as to waiving errors? In what situation is the party left who withdraws his demurrer? Undoubtedly, reason, and the general principles and *modus operandi* of the law would dictate the answer, that he should be in the same situation as if he had never filed his demurrer—and should no longer be able to object to any defects in the declaration which would have been cured if he had pleaded to it without demurring. Any other doctrine would produce the most preposterous consequences. A demurrer withdrawn, is the same as no demurrer put in—and the difference between withdrawing and holding by the demurrer is, that if the party rested upon his demurrer he might have the advantage of many errors which are cured by pleading over and by a verdict.

If therefore the Kentucky decisions had said that where a party withdraws his demurrer, he stands in the same attitude as if he had never demurred, and loses the benefit of all exceptions to the pleading

demurred to, which are cured by responding to it, without demurring, and by a verdict, the decision would undoubtedly have been correct. And the principle, as stated in *Hardin*, does in fact amount to the same thing—that “the withdrawal of a demurrer supersedes the demurrer and the judgment given upon it, as completely as if none had been filed, or any opinion given upon it.”

Thus in *Creswell vs. Packham*, 6 Taunt. 631, where there were several counts in the declaration, some good and some bad, the defendant demurred generally, and his demurrer was of course overruled. After a writ of enquiry was executed he moved in arrest of judgment, because there being some good and some bad counts, the damages had been assessed generally. The court, following the decision in *Edwards vs. Blunt*, said, “where the defendant might, on arguing the demurrer, have availed himself of the exception, he shall not afterwards move in arrest of judgment. The defendant might have taken this exception, in substance, on the demurrer, for he might have objected to the vitious counts, and having obtained judgment on them, no damages could ever have been assessed thereon. *And he is not without remedy by writ of error. It is more convenient to adhere to that practice, than to indulge the defendant with relief now on motion.*”

That case is exactly in point. We claim that in this case there are two bad counts, at least; and that a general verdict has been given—and therefore, according to the case just quoted, although we were not entitled to relief on our motion in arrest, yet “*we are not without remedy in error.*” We do not claim that the court below erred in overruling our demurrer. We do not claim that it erred in overruling our motion in arrest of judgment, but we aver, which is the common assignment of error in law, that the declaration is insufficient in law to support the judgment; and that the judgment was rendered for the plaintiff instead of the defendant. *Howe*, 481.

That the principle is perfectly well established that where there are some good and some bad counts, and a general verdict, the judgment must be reversed, see, *Candler vs. Rositer*, 10 Wend. 492; *Dryden vs. Dryden*, 9 Pick. 547; *Backus vs. Richardson*, 5 J. R. 476; *Cheetham*

vs. Tillotson, *ib.* 430; *Eddowes vs. Hopkins*, *Doug.* 376; *Clark vs. Lamb*, 6 *Pick.* 516.

These principles being established, two questions then arise and present themselves for determination: *First*, what errors and defects exist in the declaration apparent on the record? and *second*, are those defects of such a nature that they are cured by pleading to the declaration, or by a verdict?

Without referring to some of the objections taken to the counts heretofore, we remark that the first count alleges, that Holliday caused to be delivered to Sevier, and Sevier accepted and received from him "a certain note of hand made by one Joshua J. Henniss, calling for one hundred and thirty-three dollars, to bring suit on, recover and collect of and from the said Joshua J. Henniss, for the use and benefit of Holliday, for certain fees and reward to him the said Sevier in that behalf."

The objections which we make to this count are,

1st. That it does not state that Henniss was legally liable on the note, or that it contained any promise to pay any sum of money.

2nd. That it does not state to whom the note was payable.

3rd. That it does not show any title in Holliday to the note, inasmuch as it neither states that it was payable to, or endorsed to him, or delivered to him in any way.

4th. That it contains no statement of any promise or undertaking by Sevier to sue on and collect the note, and therefore, neither expressly or by implication states any obligation upon him to do so; and

5th. That it contains no statement, in legal language, or in effect, that Sevier was to receive any fee or reward for so doing, or if so, by whom the fee or reward was to be paid; and consequently no consideration is stated for any undertaking of Sevier, even if any undertaking was stated. We shall hereafter discuss these defects.

We object to the second count. It states that Holliday caused to be delivered to Sevier, as attorney, a certain other note for one hundred and thirty-three dollars, "to him the said Ambrose H. Sevier, being such attorney as aforesaid, in a reasonable time then next following suit brought on it, and the said debt of one hundred and thirty-

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three dollars as aforesaid recovered and collected” of and from said Henniss, for the use and benefit of said Holliday, “for certain fees and reward to the said Sevier in that behalf;” and that although Sevier “accepted and had and received the note aforesaid, and undertook to bring suit on the note aforesaid,” and to recover and collect the one hundred and thirty-three dollars as aforesaid, and although a reasonable time has elapsed, &c.

This count is still more radically defective. In fact it has hardly the semblance of a count, and contains hardly a single allegation from which any liability could be inferred. It is utterly incoherent, and contains no statement of any cause of action. More particularly, it is defective, because, first, it does not state by whom, or to whom the note was executed: second, it states no title in Holliday to the note, not even that it ever was in his possession; no title in him either as payee, endorsee, or holder: and third, that there is the same defect as to a statement of consideration as in the first count.

We will now proceed to examine as to what defects are not cured after verdict, and apply the rules, so ascertained, to the objections above stated. The court having decided that the plaintiff himself disproved his count in trover, we do not raise any question on that count, although it should, undoubtedly, have been declared bad on demurrer, for want of the allegation that the plaintiff was possessed of the note as of his own proper goods; *Jones vs. Wuickworth, Hardres iii*; for want of a sufficient description of the note, and for want of a positive statement of the value of the note: 4 B. & A. 271; and is probably bad on error.

Let us see, then, what defects are not cured by pleading in chief or by verdict. The subject, as well in regard to what defects were cured at common law, and what by the statutes of jeofails, is learnedly discussed by Mr. Sergeant Williams, in his note to *Stennel vs. Hogg*, 1 Saund. R. 228, A. B. and C.

The principle which he first lays down, and which is material to our guidance, is, “that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defect-

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ively or imperfectly stated, or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission, is cured by the verdict, by the common law."

The application and extent of general rules like this, can only be learned or understood from particular cases. There is generally, if not always, something indefinite in general rules, couched in general language; and it will therefore be necessary to examine certain cases elucidating this rule.

Where the declaration stated that the defendant had sold to the plaintiff all the furzes growing on certain land, to be taken before a certain time, and promised that he should enjoy and carry away the furzes without disturbance; and although defendant had permitted him to carry away fifty loads of furzes, yet he did not permit him to enjoy all, *according to his promise*, but disturbed him from taking away a thousand loads, *which were growing upon the lands at the time of the promise*. Plea, *non assumpsit*, verdict and judgment. The error assigned was, because the declaration did not state the time of disturbance, nor show that it was before the time fixed for carrying them away. The court held, that after verdict, it should be intended that it was within the time, otherwise there had been no cause to have damages—and it was not material that the time of disturbance should be alleged; *for it was collateral to the promise*. *Hall vs. Marshall*, Cro. Cqr. 497.

So where the bargainee of a reversion brings debt for rent, and alleges no attornment by the tenant to him, the omission is cured after verdict. *Hitchin vs. Stevens*, Sir T. Ray. 487; *S. C.* 2 Shower 233. In this case *the grant of the reversion* was alleged, and there could have been no such grant without attornment. So in the former case, the allegation that "the defendant did not permit him to enjoy the furzes *according to promise*," included in fact an affirmative that he disturbed him before the time. And this brings us to the case of *Spiere's vs. Parker*, 1 T. R. 145, where the rule is clearly laid down by BULLER, Judge. "After verdict," said he, "nothing is to be presumed but what is *expressly stated* in the declaration, or what is necessarily implied from those facts which are stated. That is the case where a

feoffment is pleaded without *livery*. A *livery* is always implied, *because* it makes a necessary part of a *feoffment*." That is, where the *whole* is stated to exist, the existence of *the parts* is implied—and if the *chain* is stated to exist, the existence of *the links* will be implied. He says that he knows of no decision against this rule: and mentions, as the only authority against it a dictum of Lord HARDWICKE, in *Wicker vs. Norris*, *Cas. Temp. Hard.* 116, where he says that a certain fact must be presumed to have been proved at the trial, *because otherwise the jury could not have found at all*. And although what BULLER called a dictum of HARDWICKE appears by the report itself to have been the judgment of the whole court, and is supported by some of the older cases, still it is now settled not to be law to its full extent. In fact, if it were, a writ of error could never be supported, for any defect in the declaration whatever, after verdict. Thus in *Rushton vs. Aspinall*, *Doug.* 653, Lord MANSFIELD denied the rule to be correct to that extent; and laid down the true rule—that "where the plaintiff has stated his title, or ground of action *defectively* or *inaccurately*—because, to entitle him to recover, all *circumstances* necessary, in form or substance, to complete the title, so imperfectly stated, must be proved at the trial—it is a fair presumption after verdict, that they were proved; but where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial; and, therefore, there is no room for presumption." And again he said, "if they were to be presumed to be proved, *no proof* at the trial can make good a declaration which contains no ground of action on the face of it.

Precisely the same rule is recognized in *Crouther vs. Rosfield*, 1 *Salk.* 365, where the whole court held that, "though a title which could not be good could never be aided by a verdict, yet a title in a declaration which was only imperfectly set forth, *and where the want of somewhat omitted might be supplied by intendment, was cured by verdict*.

So in *Bishop vs. Hayward*, 4 *T. R.* 572, BULLER, Judge, said, "the cases of presumption alluded to, are where the plaintiff has stated a case *defective* in form, not where he has shown a title *defective in itself*. If the title be defective on the face of it, the court cannot sustain the judgment.

And Sergeant WILLIAMS lays down the same rule, 1 *Saund. Ubi Sup.* He says, "if the plaintiff stated a defective title, or totally omits to state any title or cause of action, a verdict will not cure such defects, either by the common law, or by the statutes of *jeofails*; for the plaintiff need not prove more than what is expressly stated in the declaration, or is necessarily implied from those facts which are stated." And so TUDSDEN, Judge, said in *Wootton vs. Hele*, 1 *Mod.* 294, that *when a good title is not set forth in the declaration to entitle the plaintiff to his action, it shall never be helped.*

The same rule is laid down by Gould in his *Treatise on Pleadings*, page 502, 503: he says that "facts *not alleged*, and which are not *implied in or inferable from* those which are alleged and found, cannot be presumed to have been proved to the jury: in other words, no fact, not alleged, can be presumed in support of a verdict, unless proof of its existence must have been *involved in, or inferable from*, the proof of those which are alleged, and which the verdict has found." And again—"if the declaration omits to allege any substantive fact, which is essential to a right of action, and which is not *implied in, or inferable from*, the finding of those which are alleged, a verdict for the plaintiff does not cure the defect." And he instances the omission of an averment of *consideration* in *assumpsit*; of *loss of service* in a declaration for beating a servant—of the *scienter* in an action for injury done by defendant's dog.

The doctrine on this point was very much discussed in the case of *Addington vs. Allen*, in the Court of Errors in New-York. The Chancellor said, "if the plaintiff totally omits to state a good title or cause of action, even by implication, matters which are neither stated or implied need not be proved at the trial, and there is no room for intendment or presumption; as the intendment must arise from the verdict, when considered in connection with the issue upon which that verdict was given;" page 386. The same rule was admitted by Senator BEARDSLEY, page 395. And Senator TRACY, a most careful and pains-taking Judge, said "a rule like that urged on the argument, that after verdict all facts are to be presumed which are necessary to justify the recovery, so far from disentangling justice from a net of forms, would inevitably embarrass it with uncertainties, and finally

overwhelm it in confusion." "It is one of the oldest and most inflexible rules of pleading," said he, "that if a declaration does not contain a cause of action, it shall not be aided after verdict. Where facts entirely omitted are so connected with facts alleged, that the facts alleged cannot be proved, without proving those omitted, after verdict the facts omitted are presumed to have been proved on the trial; but the total omission of a material fact, which is not connected with any fact alleged, is not aided by the verdict; and this, because the plaintiff need not prove, (indeed, should not be permitted to prove,) on the trial, more than what is expressly stated in the declaration, or is necessarily implied from the facts which are stated." And finally he adopts and declares the rule, laid down by **BARON GILBERT**, reiterated by **Lord MANSFIELD**, and approved by Chancellor **KENT**, in 17 *J. R.* 458, that, "if any thing essential to the plaintiff's action be not set forth, though the verdict be found for him, he cannot have judgment, because, if the essential parts of the declaration be not put in issue, the verdict can have no relation to it; and if it had been put in issue, it might have been found false." 11 *Wend.* 415.

It is unnecessary further to multiply quotations from authorities upon this point—nor would we have so far pressed upon the patience of the court but for the strenuous endeavor of the counsel for Holliday to show the verdict in this case to be omnipotent to heal.

Let us now test the two first counts in the declaration by the rules which we have shown to be established, and see whether any of the defects already enumerated are such as are not cured by verdict.

The first count, then, does not state that Henness was, in any way, liable to pay the amount of one hundred and thirty-three dollars, or any other amount, upon the note mentioned in the count, to Holliday or to any other person whatever. Nor is the fact that he was liable to pay it to Holliday inferable from, or involved in any other allegation in the count. There are but two allegations or expressions in the count from which any such liability to pay Holliday can even apparently be inferred; and these are, first, that Henness made the note calling for one hundred and thirty-three dollars; and, second, that Holliday caused it to be delivered to Sevier, and Sevier received it,

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to sue on for the use and benefit of Holliday. In regard to the former expression, as there can be no promise unless there be some person to whom it is made, so to state the making of a note by A, *calling for so much*, is not to state that by the note he promised or became liable to pay so much, more especially when it is not stated who was payee in the note, or that there was any payee. Further, the expression, "*calling for so much*," means that the amount mentioned is the amount appearing on the face of the note. It is not an allegation that so much is *due* on the note, and there is no allegation in this count that the amount called for in the note, or any part thereof, *was due*. And of course, unless Henness was liable upon the note, and could be legally compelled by suit to pay it, no action could lie against Sevier for failure to sue.

As to the allegation that Holliday caused the note to be given to Sevier, and Sevier received it "*to collect for the use and benefit of Holliday*," it is not an allegation that Henness was liable to pay it to Holliday, or that if the money were collected, Holliday would be entitled to receive it. Admit that this allegation shows, with sufficient certainty, that the *object* of Holliday's *giving* and Sevier's *receiving* the note, was to have suit brought on it for Holliday's benefit, it does not imply or mean, either by the rules of pleading, or the common construction of language, that the suit, if brought, *would* have been, in law, for his use and benefit. Admit that he gave it and Sevier received it, for that object, (and that is the very extreme extent of the allegation,) and it does not follow, because such was their object, that, therefore, that object could be legally attained. Suppose that he had obtained possession of the note by a tort or a theft, clearly, in such case, no suit brought upon it, could have been "*for his use and benefit*," in law—because in law he would not be entitled to the proceeds of recovery—and yet the same averment might be made as to his *object* in giving the note to an attorney—that he gave it to the attorney and the attorney received it, to collect for his use and benefit. And in this we cannot be mistaken, unless it can be asserted and decided, that the *object* of a party is always and invariably the same with the ultimate result in law to be attained by him.

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There is, therefore, no statement of any *liability* in Henness to pay the note to Holliday, or any right in Holliday to recover the proceeds of the note. In other words, no title to the note is stated as in Holliday—and “it is common learning,” said Lord MANSFIELD; “that a verdict cures a title defectively stated, but not a statement of a defective title.” The statement of Henness’ liability and Holliday’s title is wanting; and there is no other allegation in the count from which either is inferable—they are implied in no other allegation—they are involved in no other. Are there any other facts stated in the count, which could not be proven without at the same time proving Holliday’s title to the note, and right to receive the proceeds of it? True, if he had alleged in this count, simply, that he was entitled to the proceeds of the note, this general allegation after verdict would have cured the omission to state *how* he was entitled—whether as payee, endorsee, or holder by delivery. The count does not contain such a general allegation—it neither shows that he was payee or endorsee, nor that he ever had possession of the note; but on the contrary, that he “*caused* it to be delivered” to Sevier. Is there not here a “total omission of a material fact which is not connected with any fact alleged?” Is there not “something essential to the plaintiff’s action, which is not set forth?” Is “a good title set forth in the declaration?” Could proof of this fact, of Holliday’s interest in, or right to the proceeds of the note, and Henness’ liability to him, have been “involved in, or inferable from, the other facts alleged?” An answer to these questions will settle the whole matter.

Again, there is no allegation in this count that the note was due at the time of bringing the suit even, much less at the time when it was delivered to Sevier. Neither the date nor day of payment of the note was set out, and consequently it does not appear, either by allegation or inference, that Henness had ever become liable to pay the note at all, to any body; and consequently, there is an utter failure to show any obligation on the part of Sevier, to bring suit on the note, for he could not be compelled to do so, before it became due.

In regard to the liability resting upon Sevier, supposed to arise from what is considered as an allegation in the count of a contract between him and Holliday, and a retainer by one, and an acceptance thereof

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by the other; the allegation is, that Holliday caused the note to be delivered to Sevier, and Sevier received from Holliday the note, to bring suit on, recover and collect from Henness, for the use and benefit of Holliday, "for certain fees and reward to him, the said Sevier, in that behalf."

An attorney is not like a common carrier, a porter, or a ferryman, who are bound from their situations in life to perform the work tendered to them; but he is like a carpenter or other mechanic; no consideration results from his situation as an attorney; nor from his undertaking to perform any particular service; nor is he bound to perform all the work tendered to him. He is only bound to attend to the business of another, upon an agreement with him so to do, and upon a consideration agreed upon between the parties. If he undertakes to do certain labor, without any consideration being fixed, and fails to do it, he has merely told a falsehood, and has not performed his promise; but for his non-performance of it, no action can be supported. Where a person agrees to do a thing without any consideration, and fails in his promise, no action will lie against him for non-performance. See *Elsee vs. Gatward*, 5 T. R. 149, 150, 151. In that case it was said that, "if a party undertakes to perform work, and does not proceed on the work, no action will lie against him for the non-feasance"—i. e., where no consideration is alleged—and further, "that in order to compel him to perform it, it should appear that there was an *express consideration* for it; the word 'retain' does not necessarily show that there was a consideration." And as Lord KENYON said in the same case, "the justice of the case will not be altered by the form of action; for if assumpsit will not lie in such a case, there is no technical reasoning that will support such an action, as for a tort." And therefore he relied on *Coggs vs. Bernard*, 2 Lord Raym. 909-919. So in 3 Henry VI, 36 B., 37 A., BABINGTON, Chief Justice, said, "if I bring a writ of deceit against one for this—that the defendant was my attorney, and that, by his negligence and default, I should lose my land, &c.,—in this case it is fit that I should declare *how he was retained by me, and took his wages*, or otherwise the trial is abated." See this case translated and quoted in *Thorne vs. Deas*, 4 J. R. 90, in which case the doctrine of *Elsee vs. Gatward* is reiterated and confirmed.

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We admit, of course, that if the count had previously showed Holliday's interest in, or right to, the note, then the reception of it by Sevier, as alleged, would be considered the first step in the execution of the contract on his part, and no other consideration would be necessary; for it would then be a mis-feasance, and not a non-feasance. But inasmuch as no such title or interest appears elsewhere, but is attempted to be deduced from the retainer by Holliday, and the fees and reward to be paid, we contend that no sufficient consideration for Sevier's implied contract with Holliday is alleged, because it is not shown that the fees and reward were to be paid by Holliday; and that the court must infer that the fees and reward were to be paid by the person entitled to the proceeds of the note, and to whom alone Sevier was responsible—and who that person was, does not appear.

In *The Bank of Utica vs. Smedes*, 3 *Cowen* 662, which was an action on the case, by Smedes, and others, against the Bank, for neglect of the Bank in not collecting a note left with them for collection, the declaration, which is set out at length, alleges, with technical accuracy, that the plaintiffs were partners, &c., and the defendants, pursuant to an act of the Legislature, had established an office of discount and deposite in Canandaigua, and were then and there transacting and doing business as bankers, by the description of *the Utica Branch Bank at Canandaigua*, that certain persons, who are named, were, on the 12th of August, 1817, partners under the firm of Underhill and Seymour; that on that day the firm of Underhill and Seymour made their certain note, called a promissory note, whereby they promised to pay, to the order of John C. Spencer, at said Bank, 1237 dollars, with interest from date, for value received: it then alleges an assignment of said note, all in technical form and language, to the plaintiffs, and an endorsement by the plaintiffs to the defendants; that the note was deposited in the Bank to be collected, and that the defendants, President, Directors, and Company of said Bank, in consideration of such endorsement and deposite for collection, assumed and faithfully undertook to present it for payment, &c., and in case of default of payment, then, in consideration of certain reasonable fees and rewards, to be therefor paid *by said plaintiffs*, to said defendants, they undertook to give notice of protest to Spencer, and render him

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liable as endorser: then follows the breach. The second count was substantially the same—and the third count set out the note verbatim, and regularly stated the endorsements.

We refer to this case, in order to show the vast difference between a good declaration and the one now before the court. And yet several objections were raised to the declaration referred to, and the case was argued in the Supreme Court and Court of Errors, on the sufficiency of the declaration alone.

That it is necessary for the plaintiff, in such an action as the present, to show in his declaration his title to the instrument to be sued on, or his right to the proceeds of it, when collected, resulted not only from the rules of pleading, but from the fact that if he had no such title or right, he has not been injured by the defendant's negligence, and consequently has no right of action. If he was not entitled to the proceeds of the note, he has not been injured, because no suit has been brought on it.

That in case, it is necessary to state the plaintiff's right or title in the matter or thing affected. See 1 *Ch. Plead.* 365; 1 *Saund. Plead. and Ev.* 339, 346; *Dawes vs. Peck*, 8 *T. R.* 330.

In *McKinster vs. Bank of Utica*, (which was another suit against the bank for non collection of a note left with it for collection,) the question as to who was entitled to bring the action was expressly decided. McKinster being indebted to Pardee, turned over to him the note in question, executed by one Dunn, and it was agreed that if the note was paid the amount was to be applied by Pardee to his debt, but if not paid, McKinster was still to be responsible to him. Pardee then left the note at the bank for collection, and it being protested and no notice given to the endorsers, he took it away again, and called on McKinster for payment, who paid him the amount and received the note back. The court decided that although Pardee had the control of the note, and the money would have been his if it had been paid; and although he left the note at the bank, and McKinster never had any intercourse with the bank in relation to it, yet the legal interest in the contract was in McKinster alone, and he alone could bring an action of assumpsit or case against the bank. 9 *Wend.* 46.

In the same case, in the Court of Errors, 11 *Wend.* 475, it was again decided that "the duty on the part of the bank, not being founded upon any express contract with the individual depositing the note for collection, but upon an implied agreement arising from the custom of banks, the duty is raised, or the assumpsit implied, *in behalf of such person as may be beneficially interested in having the duty performed*—that if A leaves a note for collection, and B becomes the owner of it before the time for the performance of the duty arrives, the latter is the proper person to bring the suit for an injury arising from the neglect of that duty."

These cases conclusively settle that Holliday could not maintain his action unless he showed that he was beneficially interested in having the suit commenced against Henness. We do not contend, nor do we understand the court to decide in the opinion which is questioned, that only the *legal owner* of the note can sue in this action—a position supposed by the defendant's counsel to be assumed, and which they controvert with vehement exertion. But we do contend, and of this the authorities admit no doubt, that he can only succeed upon a declaration which shows either the legal or equitable ownership of the note to be in him, and that he is legally or equitably entitled to the proceeds of it. And further, the two cases last quoted establish that the mere fact that A delivered the note to the bank or to an attorney to collect, and made with the bank or attorney the contract for the collection, will not, of itself, entitle him to sue the attorney for negligence.

The first count, therefore, is radically defective. It states, to be sure, that Holliday caused a note to be delivered to Sevier, which note was made by Henniss, and called for 133 dollars. But it does not state that the note was made payable to any person whatever, or that it was due when delivered, or when this suit was instituted. It does not state that Holliday was payee or endorsee of the note, or that the property in it had equitably become his, or that it was ever in his possession. It does not state that Holliday would have been entitled to the proceeds of it if collected. It does not state that Sevier undertook, or promised, or agreed, to sue upon it, or if so, when and within what time, but merely that he "received it to sue on and col-

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lect." It does not state that the fees and reward were to be paid by, or the consideration to move from Holliday; and the question is, whether this count, stating no title at all, is defective after verdict. That it is, we think, hardly admits of a doubt.

The second count it is not necessary to consider at length. The objections made to the first apply with equal force here—and in addition it is so utterly incoherent and inane as to state no cause of action whatever. In truth there is hardly an allegation in the count, and it is only strange that the verdict of the jury and judgment of the court below should ever have been attempted to be sustained upon it.

If either of these counts is bad, then the judgment must be reversed. This we have already shown.

And we may notice here the new point assumed in the defence, to wit: that the setting aside of the judgment by *nil dicit* was unauthorized and irregular, and every thing done thereafter equally so. If this be the case, then the judgment must either be reversed, and go back for a writ of inquiry, and then come back here again, when the same questions will arise, and one bad count demolish the verdict; or the court must invent some new method of proceeding with which we are unacquainted.

As to the opinion of the court below, in admitting the receipt of Sevier in evidence, it will be necessary to say but a few words. The declaration in this case shows a defective title. It omits to allege Holliday's interest in the note, or his right to receive the proceeds; and it also omits to show any liability in Henness to pay it to any body at any time. It is not necessary for the plaintiff to prove, *and he will not be allowed to prove more than he has alleged*, where he omits to allege a fact essential, of the gist of his action, and not involved in, implied in, or inferable from any other allegation in the count. He could not recover without proving what he had omitted to allege—and he offered this receipt to prove the very things which he had omitted to allege. He offered it to prove that the note was due, and that Sevier had received the note from him, and the receipt was either impertinent, because it did not prove or tend to prove his interest in the note and Henness's liability, or it was evidence to prove facts not al-

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leged, and which therefore he was not allowed to prove. In either case it was improperly admitted as evidence. The *reason* assigned by the court below for admitting it, is improperly before this court. It is not an instruction to the jury, nor does it appear that the jury ever heard it. It is merely the reason for a decision—and a decision might be right, though the reason given for it was wrong. And so here, the reason given for admitting the receipt may be correct. It might “conduce to prove a *privity* of contract,” and still have been wrongly admitted. No such *privity* of contract is alleged in the count. A *contract* is alleged, but no *privity of interest* is alleged, which makes a *privity* of contract, for Holliday might contract with Sevier by handing him the note as agent of English, and yet there would be no *privity* of contract. No *privity* of contract therefore is alleged, because it is not alleged that Holliday was interested in the note.

And it may further be questioned, whether, (as every pleading is to be taken most against the pleader,) the court would not infer that the note mentioned in the first and second counts was payable to Holliday himself. It seems to us that such would be the presumption. And if so, the receipt could not be admitted, because it was for a note payable to another, and no such note was mentioned in the count; and further, it was for a note due on a day certain, and no *such* note is described in the count. This we suggest for the consideration of the court; but we rely with perfect confidence on the other ground assumed, to wit: that essential allegations are omitted, and therefore no proof of those allegations could be adduced.

TRAPNALL & COCKE, in response:

The counsel for the plaintiff has again discussed the effect which the withdrawal of a demurrer and pleading over to the merits ought to have in waiving errors. Having heretofore fully considered this question and adduced before the court all the authorities in relation to it within our reach, we shall not obtrude upon them a second argument on this point.

Since the first discussion of this question in this case, the court in the cases of *Jarrett vs. Wilson*, 1 Ark. 137, and *Gage vs. Milton*, 224, have recognized the doctrine insisted upon by us, (not that imputed to us in the plaintiff's brief,) and we have seen nothing in the

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argument or authorities cited by the opposing counsel, calculated to shake the decision in those cases. Indeed the authorities cited sustain the decisions of this court made in the cases referred to. For they establish the principle that "where the defendant might on arguing the demurrer have availed himself of the exception, he shall not afterwards move in arrest of judgment." But it is insisted that although the plaintiff is now cut off from the benefit of this motion, yet that he is not without his remedy by writ of error. And his right to that remedy is placed by counsel upon the principle that where there are some good and some bad counts, and a general verdict, the judgment must be reversed. It is unnecessary to examine the numerous authorities cited in support of this latter principle. For whatever may have been the English practice upon this subject, it can have no authority here, because our own statute has introduced a different rule. It declares that where there are several counts in a declaration, one or more of which are faulty, and entire damages are given, the verdict shall be good. See *Steele and McCamp. Dig., judicial proceedings, sec. 52*. As this principle is the key stone in the arch of the argument which follows, when that gives way, the whole fabric must fall with it. And here we might safely rest the argument of this case, for there is one count which after verdict must be admitted to be good, and that is sufficient to sustain the judgment. As all the evidence in the case is not before the court, they cannot know but what the finding was in fact upon that count. But however this may have been, the law expressly requires that they shall apply it to that count, and the verdict must stand. But we are not willing to admit the correctness of the plaintiff's criticism upon the two counts in case. We concede that the draftsman of this declaration has not drawn it with technical precision and accuracy. But we deny that its defects are of that malignant character which the healing power of a verdict cannot cure. The general rule upon this subject is that the defective statement of title in the declaration will be cured by verdict, but the statement of a defective title will not. If, therefore, the declaration shows no title at all in Holliday, or a defective title, we admit the verdict cannot cure the defect. But if it shows a title in him, although imperfectly or defectively stated, the verdict will cure all defects or omissions, and

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the judgment must be affirmed. In applying these principles to this declaration, we must earnestly urge upon the court to keep steadily in view the distinction which in our argument for a re-hearing we have endeavored to draw between the suit against Henness on the note and the suit against Sevier for the breach of his contract with Holliday. The right of Holliday to maintain this action is not derived from this note, nor is this suit founded upon it. But his right of action, his title to sue, is derived from the contract entered into between Sevier and himself, and the breach of that contract by Sevier. The question then presents itself, does the declaration state a contract either express or implied between Sevier and Holliday; and show facts, although imperfectly stated, from which his right to a recovery can be inferred? That the declaration does state a contract between them is too manifest to admit of any doubt or controversy. And the *statement of that contract is the statement of Holliday's title*. It is that which gives him his right of action, and his right to recover the damages he has sustained in consequence of the breach of it. But it is objected that the first count does not state that Henness was in any way liable to pay the amount of the \$133, or any other amount upon the note mentioned in the count, to Holliday or any other person whatsoever. The objection is fully answered by the authority referred to in plaintiff's brief, and which we admit to be the true rule, "that facts not alleged, and which are not implied in or inferable from those that are alleged and found, cannot be presumed to have been proven to the jury. In other words, no fact not alleged can be presumed in support of a verdict, unless proof of its existence must have been involved in or is inferable from the proof of those which are alleged and which the verdict has found." Now we maintain that the fact that Henness was to pay the \$133 upon the note, that the note was due, and that the money when collected would be the property of Holliday, is involved in and inferable from the proof of the facts alleged and which the jury have found. What are the facts alleged?

1st. That Holliday delivered this note to Sevier, as attorney, to collect.

2d. That Sevier accepted it, and agreed to bring suit upon and collect it, for the use and benefit of Holliday for certain fees and rewards.

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3d. That Sevier violated his contract, and that Holliday in consequence thereof, lost the amount of this note.

To sustain these allegations, Holliday must have proven the delivery and acceptance of the note, and the contract for its collection as alleged. His right to the money is clearly inferable from the allegation that it was to be collected for his use and benefit. That the note was due, that Henness was legally liable for the payment, and that it could have been collected of him had Sevier used due diligence, are involved in the allegation that Sevier accepted it to bring suit upon it, and in the charge that through the carelessness, negligence, and default of Sevier, the said \$133 have been wholly lost to the said Peter Holiday. As the gist of this action is the contract with Sevier, and the injury sustained by Holliday in consequence of the neglect of Sevier to comply with the undertaking on his part, whatever tends to prove the contract and the damages sustained is necessarily involved in the issue which the jury were called upon to find. The objection we are combating seems to be based upon the supposition that the title of Holliday, and his right to sue, is founded upon the note of Henness, referred to in the declaration, and that it was consequently necessary to describe the note and his title to it with precision and certainty, and having failed to do so, it is insisted he has shown no title. We are convinced it will require but little reflection to show the fallacy of this argument. Whether Holliday had any interest in the note, whether Henness was legally liable to pay it or not, and whether the money could have been made if the attorney had used proper diligence, are matters of evidence for the jury upon the trial. The rule is well settled that the evidence by which an allegation is proved need not be stated in the declaration. 6 *Com. Dig.*, title *Pleader A.* p. 1. The case of *Pasley, and another, vs. Freeman*, 3 *Ten. Rep.* 60, was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. After a verdict for plaintiffs on the third count, a motion was made in arrest of judgment, and it was objected to the declaration that if there was any fraud the nature of it was not stated. BULLER, J. in remarking upon this objection, among other things says, "the cases I have stated and *Sid.* 146, and 1 *Kib.* 522, prove that the declaration states more

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than is necessary for *fraudulenter* without *scienter*, or *scienter* without *fraudulenter* would be sufficient to support the action. But as Mr. Twisden said in that case the fraud must be proved, the assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so, by what means that proof is to be made out in evidence need not be stated in the declaration." If the contract was made as stated in this declaration, and if Sevier did fail to perform it on his part, the damages sustained, and how and in what manner occasioned, are evidently matter of proof, and need not be stated. If the note or its proceeds did not belong to Holliday, if Henness was not legally liable to pay, or if he was insolvent or unable to pay, all these causes, or any of them, would have been a good defence to the action. Indeed the proof of these facts being necessarily involved in the issue, and essential to Holliday's recovery, the law will now presume them to have been proved and the defects or omissions of the declaration will be cured by the verdict. It is further urged as a radical objection to this declaration, that it contains no statement of Holliday's title to this note. The answer we have given to the former objection is a sufficient reply to this. The plaintiff's counsel admits that if the declaration had stated that Holliday was entitled to the proceeds of this note, this general allegation after verdict would have cured the omission to state how he was entitled. Although the declaration does not contain such an allegation in *totidem verbis*: yet it does contain an averment which in its legal import is the same. It distinctly states that this note was to be collected for the use and benefit of Holliday, and that he, by the negligence and default of Sevier, wholly lost the \$133; under this averment it would clearly be competent for him to introduce proof to show that the money when collected would be for his use and benefit, and in doing so to make out his title to the note. It is imputed as a farther defect in this declaration that there is no allegation that this note was due at the time of bringing this suit. If the note was not due at the time of its delivery to Sevier, or at the time of bringing this action, Holliday, of course, could not recover. But the failure would not be owing to the want of an averment that the note was due, but it would be for want of proof to show a breach of the contract and injury to Holliday, by

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the negligence and default of Sevier. No action could of course be maintained upon the note until it became due. And the jury could not have found that Sevier had violated his engagement to sue, or that Holliday had sustained any injury by his neglect, unless a right of action had accrued. And as the proof of each of those facts was necessarily involved in the issue which the jury were to try, their verdict is a conclusive response to this objection.

But it is contended that an attorney is not like a common carrier, &c., and that where he agrees to do certain things, without any consideration, and fails in his promise, no action will lie. Upon this point there is some conflict of authority; but, conceding the principle to be truly stated, we cannot perceive its application to this case. For we find, upon an examination of the authorities referred to in plaintiff's brief, that they are decided expressly upon the ground that the promise was a mere gratuity, made without any consideration whatever. But a consideration is expressly stated in this declaration. Sevier undertook to bring suit on this note, and collect the money for Holliday for certain fees and rewards. To make this objection available to the plaintiff, it would be necessary to show that no action could be maintained for the breach of promise to perform certain services, unless the contracting parties, at the time of making the contract, had expressly liquidated and agreed upon the precise amount of the fee or reward to be paid for the services. A position which, we fearlessly affirm, cannot be sustained by one single authority. If A engages an attorney to perform certain services, and agrees to pay him therefor, the promise, on the part of the attorney, is not a gratuity, but made upon a good and legal consideration, and although the exact amount of the fee to be paid is not expressed, the law will imply that he is to receive a reasonable reward. Plaintiff's counsel admits, if the court had previously shown Holliday's interest in, or right to the note, then the reception of it by Sevier, as alleged, would be considered the first step in the execution of the contract on his part, and no other consideration would be necessary. The declaration does allege that the contract was made between Holliday and Sevier—that the service to be performed was for the use and benefit of Holliday—and the obvious and necessary presumptions of law would be that Holliday,

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who had engaged the services of Sevier for his own benefit, was alone responsible to him for his fees and reward. The counsel for plaintiff, in substance and effect, insists, in defiance of all the well settled rules of presumption, that the court must now presume that this note belonged to, and was to be collected for the use and benefit of some one else. They must presume that Holliday made the contract for some one else, and not for himself, and that that other person, and not Holliday, was liable to Sevier for his fees and reward. And then, upon this long series of unwarrantable presumptions, he asks the court to build the further conclusion, that there was no consideration passing between Holliday and Sevier to sustain the promise made by the latter, and that it was, therefore, a mere gratuitous promise, for the breach of which no action would lie.

We have examined the case of *McKinster vs. The Bank of Utica*, and cannot perceive that it establishes a single principle hostile to the rights of Holliday. In that case the court decided that the suit was properly brought in the name of McKinster, because the facts, in evidence before them, proved that, at the time of bringing the suit, the property in the note, and the right of action, was in him. The facts, as stated in the opinion of the court, were as follows: "It appeared, from the testimony of William J. Pardee, that the plaintiff being indebted to him in the sum of \$1500, after the note was made, and before it was payable, turned out this note and another for \$300 in part payment of said debt. That the agreement was that, if the notes were paid, the amount was to be applied by the witness to his debt; but if not paid, the plaintiff was still to be responsible. The witness stated *in express terms*, that he did not consider himself the owner of this note; but had the control of it, and the money would have been his, if the note had been paid. The plaintiff paid witness the amount of this note after it was received back, and the witness then returned the note to the plaintiff. The witness left the note at the Bank, and the plaintiff never had any intercourse with the Bank in relation to it." It was contended that the action was brought in the name of Pardee, and not McKinster. With these facts in proof before them, the court go on to say that, "McKinster was the only person legally interested in having the endorsers duly charged; he was absolutely bound to pay

the amount of this note to Pardee, if the note itself was not paid at maturity. The property in the note was vested in Pardee; he held it as collateral security only, to be returned if not paid." And we beg the court to mark, particularly, one of the leading reasons for this conclusion, and that is, that as the injury had fallen upon McKinster, he was entitled to the redress which the law affords. Is there any thing on the record, in the case now before the court, which shows that Holliday had no property in the note; that he held it merely as collateral security; that the debt which it was given to secure had been paid; and that he had consequently sustained no injury from the default of Sevier? On the contrary, the legal inference, from the finding of the jury, proves the reverse of this to be true. As the question of damages was directly in issue, the verdict in favor of Holliday is conclusive that the injury, which resulted from the breach of the contract, had fallen upon him; he, therefore, was entitled to the redress which the law affords. The counsel for plaintiff, before he can derive any benefit from the authority here referred to, must induce the court to indulge the illegal and extravagant presumption, that Holliday did not make the contract for himself, but for another; that he had no interest in the note, legal or beneficial; and that he sustained no injury from the loss of the money, by Sevier's neglect. If counsel for the plaintiff was at liberty to thrust aside the facts stated on the record, and substitute in their place their own fanciful and strained presumptions, we admit his authority might have some application to this case, and his arguments some force. But we cannot believe, after the verdict of the jury has found all these facts in favor of Holliday, that the court will presume away his rights. They will require something more tangible—more certain and positive, before they will consent to reverse the judgment below.

We have heretofore endeavored to establish the position, that it was not necessary, to enable Holliday to sue for the breach of this contract, that he should have the legal interest in the note. It was enough if he held an equitable or beneficial interest. And the authority cited by plaintiff, from 11 *Wend.* 475, is directly in point, "the duty is raised, or the assumpsit implied, in behalf of such person as may be beneficially interested in having the duty performed." This decla-

ration does allege a beneficial interest in Holliday. It expressly declares this note was to be collected for his use and benefit. How, or in what manner he became entitled to that beneficial interest, it is not necessary to aver. Such a rule would give rise to a tedious and vexatious prolixity in pleading, without any corresponding benefit. It is sufficient to aver the existence of that interest, while the manner, or title by which it was acquired, will be the legitimate subject of proof, upon the trial. And the fact, that a mere beneficial owner of a note can maintain an action at law, against an attorney, for his breach of contract to collect, shows, conclusively, that their right of action is not founded upon plaintiff's title to the note, but upon the contract with the attorney. For if the title or right of action, was derived from, or founded upon the note, that title, to maintain an action at law, must be a legal title, and not a mere equitable or beneficial interest. If, then, Holliday's title to the note does not give the right of action, how can it be necessary to state that title? And can it be said that he has shown no title in himself to maintain this suit, because he has omitted to state a circumstance which, even if alleged, could have given him no legal right of action.

Having already, in our argument for a rehearing, discussed the propriety of introducing Sevier's receipt in evidence, we deem it unnecessary to argue that question again. We would, however, remark that, if we are correct in the positions we have above assumed, they are a sufficient answer to the objections urged to the admission of this receipt in evidence. For those objections grow out of, and are founded upon the propositions we have been combating, and upon which the plaintiff's counsel seem to stake the result of this cause.

We shall not question the authority cited in plaintiff's brief, in regard to the defects cured by verdict; we should, ourselves, have referred the court to most of them, had we not been anticipated by the opposing counsel. But we deny the application attempted to be made of the principles, settled by those authorities, to the facts of this case. The true principle is stated, with admirable clearness and precision, in 1 *Saund. Rep.* 228, a note I. "When there is any defect, imperfection or omission, in any pleading, whether in *substance* or form, which would have been a fatal objection upon demurrer, yet if the

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issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by verdict by the common law." And the case stated in illustration of this rule is, that where in a debt for rent by a bargainee of a reversion, the declaration omitted to allege the attornment of the tenant, which before the statute of 4th Anne was a necessary ceremony to complete the title of the bargainee, and upon *nil debet* pleaded, there was a verdict for the plaintiff, such omission was cured by the verdict by common law, but is a fatal objection after judgment by default, since the statute of 4 Anne; and this construction seems agreeable to the spirit, as well as the letter of that statute. For it is clear that, *unless the tenant had in fact attorned, the plaintiff was not entitled to recover. It is not alleged in the declaration that the tenant had attorned.* It is, at least, as probable that he had not attorned, as that he had; and it does not appear which is the fact. Upon what ground, then, can the court presume attornment? The judgment by default affords none, for that *only admits such facts as are alleged.* But where the verdict has established the grant, that is a sure ground whence the court can presume attornment, because, without proof of it, *the plaintiff could not have made out his title as bargainee of the reversion; nor could Holliday have established that the note, in this case, was to be collected for his use and benefit, or shown that he had sustained any injury from the laches of Sevier, without proving either a legal or beneficial interest in the note.* The proof of the fact was necessarily involved in the issue submitted to the jury, and the court will now be fully warranted to presume that that fact was proven. The authority, above cited, shows conclusively that the omission to state a material fact, and one, too, without the proof of which the plaintiff would not be entitled to recover, will be cured after verdict. It is manifest, therefore, that the statement of a defective title is not made out against a declaration in every case where it fails to aver a fact essential to entitle the plaintiff to recover. The allegations, in the declaration, may not, of themselves, show a title in the plaintiff to support the judgment; yet they may lay a

foundation for the introduction, before the jury, of proof to supply those omissions, and thereby perfect his title. The title will then be inferred, not from the declaration alone, but from the declaration, plea and verdict. The distinction is between those cases, where no right of action whatever is stated, and no facts alleged from which such a right can be inferred. And those cases where the declaration contains an imperfect or defective statement of title—where it alleges such facts as do not, of themselves, contain a full and perfect title, but which lay the foundation for the introduction of proof, which will supply the omission, and cure the defect. The counsel for plaintiff, not attending to this important distinction, seems to predicate his argument upon the belief that the declaration will be radically and incurably bad, unless every fact upon which the plaintiff's right of recovery depends is fully and distinctly stated. It is this misconception which has led him to insist that the declaration in this case should have stated Holliday's title to the note—the liability of Henness to pay—that the note was due, &c., &c. Even admitting that Holliday could not recover without the proof of those facts, it does not, from them, necessarily follow that the declaration, in omitting to state them, is incurably bad. For if it states any other fact, the finding of which involves the proof of other facts not stated, it will be sufficient after verdict. In this case Holliday could not have obtained a verdict for damages without proving Henness' liability to pay—that the note was due—and that he was entitled to its proceeds when collected. In examining the reported cases, we find many instances in which the title is far more defective than in the one now before the court, and yet the omissions have been held to be cured by the verdict. The case of *Ward vs. Bartholomew*, 6 Pick. 410 “was a writ of entry, in which the demandant claimed an undivided third part of a certain tract of land in Sheffield,” whereof the tenant unjustly disseized the demandant within thirty years. The tenant pleaded *non disseisivit*. A verdict was found for the demandant, and a motion was made in arrest of judgment, because the declaration contained no statement of title, as it wholly omitted to allege that the demandant had ever been seized; and the appellate court, in delivering their opinion, say, “that the count, on which the verdict is returned, is remarkably

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defective; and, upon general demurrer, the defect would have been fatal. This declaration, though it alleges no seisin, in the demandant, avers that he was disseized by the tenant. Now it is plain that such a verdict could not have been returned without proof of a seisin by the demandant, for he could not be disseized without having been seized; and no court could have allowed, nor could any jury have agreed, in that verdict, unless there was sufficient evidence of *the fact, without proof of which the demandant could not have advanced a step on the trial.* It is true, a seisin can only be inferred from the declaration, plea and verdict; and that the case is still left destitute of any averment, or even implication, of the nature and extent of the seisin." See also, *Kinsley vs. Bill*, and another, 9 Mass. Rep. 189, *Boaden vs. Ellis*, 7 Mass. Rep. 507.

We think we have conclusively shown that the title of Holliday to maintain this action is not founded upon the note of Henness, referred to in the declaration, but upon the contract with Sevier, and the breach of it. The note is merely the subject matter of the contract. But it is the contract itself which establishes that legal connection and relationship between the parties which gives the right of action in this case. If, then, the declaration contains the statement of a contract—the breach of that contract, and that Holliday was injured thereby—it lays the foundation for the introduction of the proof of all the circumstances which establish that contract, the breach it, and the consequent damage to Holliday. And, after verdict, the court must presume that every fact, necessary to establish each of these specific allegations, was found by the jury.

DICKINSON, *Judge*, delivered the opinion of the court:

At the January term, 1837, an opinion was delivered in this case, reversing the judgment of the court below, and remanding the cause for further proceedings to be had therein according to law. At the same term the counsel for the defendant in error filed a written argument for a rehearing, which was subsequently granted, and the case now stands in the same attitude as if no opinion had ever been given. The points in controversy have been elaborately and ably argued on both sides. And after a careful review of the whole subject, we can-

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not perceive any sufficient ground for a reversal of the opinion heretofore given.

That opinion proceeded upon the principle, and was based upon the fact, that the defendant in error is not entitled to recover, because he failed to show that he possessed any interest whatever in the subject matter of the suit. And that the receipt adduced upon the trial, so far from proving a privity of contract, expressly established a legal interest in another, and therefore defeated the plaintiff's right of action. In order to understand the points that are raised by the assignment of errors, it is necessary to consider the nature and character of the action brought, and the proof that the plaintiff below adduced on the trial, to entitle him to a recovery. The action is in case, and the declaration contains three counts.

The first count alleges, that "Holliday caused to be delivered to Sevier, and Sevier accepted and received from him a certain note of hand, made by one Joshua J. Henness, calling for one hundred and thirty-three dollars, to bring suit on, recover and collect from the said Joshua J. Henness, for the use and benefit of Holliday, for certain fees and rewards to him the said Sevier in that behalf." The second count states that "Holliday caused to be delivered to Sevier, attorney as aforesaid, a certain other note for one hundred and thirty-three dollars, to him the said *Ambrose H. Sevier*, being such attorney as aforesaid, in a reasonable time then next following suit brought on it, and the said debt of one hundred and thirty-three dollars as aforesaid to be recovered and collected of and from the said Joshua J. Henness, for the use and benefit of said Peter Holliday, for certain fees and reward to the said *Ambrose H. Sevier* in that behalf." That Sevier received the note, and undertook to sue, recover and collect it, but did not bring suit, so that the debt was lost. The third count is in trover, for a certain other note for \$133, made by Joshua J. Henness, the proper goods and chattels of Peter Holliday.

The defendant filed a general demurrer to the declaration, which was overruled, and an interlocutory judgment was then entered, and a writ of inquiry awarded, returnable to the next term of the court. At the July term thereof, 1828, on a motion and affidavit filed by the plaintiff in error, the judgment previously rendered was set aside,

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and he, by leave of the court, put in a plea of not guilty, upon which issue was taken. And, on the trial of the case, the plaintiff offered in evidence the following receipt: "Received of Peter Holliday one note of one hundred and thirty-three dollars, against Joshua J. Henness, drawn in favor of William English, this the 14th of December, 1825.

A. H. SEVIER."

To the introduction of this receipt, as evidence, the defendant objected, but the court overruled the objection, and it was permitted to go to the jury. To this the defendant excepted; and thereupon a verdict and judgment were given for the plaintiff; and the case is now brought here by error to reverse the judgment of the court below. The counsel in the case having differed in regard to the opinion expressed by the court as to the receipt, the court then stated the receipt was evidence conducing to prove a privity of contract between the plaintiff and defendant; to which opinion there was also an exception taken by the defendant. He then moved in arrest of judgment, which motion was overruled.

The defendant below is charged, as an attorney at law, upon a breach of contract in the discharge of his official duty. Before the plaintiff can fix his liability, he must allege and prove a valid contract or cause of action, and its breach and violation on the part of the defendant, by which he was damnified. These facts must appear upon the record, or necessarily arise by presumption or intendment of law. An attorney is not liable, in the discharge of his official duty, for claims put into his hands to collect, as such attorney, unless it be shown that he is guilty of culpable negligence in the prosecution of the suit, whereby the plaintiff has lost his debt. Nor can he be held liable for money, collected by him as an attorney, unless a demand be made upon him and he refuses to pay it over, or remit it, according to the instructions of his client. Demand and refusal are indispensable to the plaintiff's right of recovery. And so it has been ruled in this court, in the case of *Cummins vs. McLain and Badgett*, decided during the present term. To entitle the plaintiff to recover upon the two first counts of his declaration, it was, therefore, necessary for him to prove, upon the trial culpable negligence by the attorney, in failing to collect the note put into his hands, or in refusing to pay it over, upon demand,

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after collection. These facts the plaintiff was bound to prove, or the jury were not warranted in finding a verdict in his favor. They may arise in the evidence adduced upon the trial, or they may be inferable from the verdict and judgment rendered in the court below, provided the plaintiff has set out in his declaration a good and valid cause of action.

It is contended, in behalf of the plaintiff below, that all the defects in the declaration are cured by the defendant's pleading over to the action, or that the defects are of such a character as are remedied by the verdict, or by the statute of jeofails and amendments, and that the court below rightly admitted the receipt in evidence. These propositions are denied by the plaintiff in error. And it is alleged that the declaration contains no valid cause of action; and therefore the defects of the declaration cannot be aided by a verdict, or by the statute of jeofails and amendments.

The whole doctrine upon the subject, as well in regard to what defects are cured at common law, and what by the statute of jeofails, is discussed with much ability and learning by Sergeant Williams, in his note to *Stennel vs. Hogg*, 1 *Saund. R.* 228, *A. B. and C.* The principle there laid down is, "that where there is any defect, imperfection or omission, in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily requires, on the trial, proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission, is cured by the verdict."

In *Speares vs. Parker*, 1 *T. R.* 145, BULLER, Judge, said "after verdict nothing is to be presumed but what is *expressly stated* in the declaration, or what is necessarily implied from those facts which are stated;" that is, where the whole is stated to exist the existence of the parts is implied, or where the chain is alleged to exist, the existence of the component links will be implied after verdict. And this doctrine is fully sustained by all the authorities upon the point.

In *Addington vs. Allen*, in the Court of Errors in New-York, the Chancellor said, "if the plaintiff wholly omits to state a good title or

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cause of action, even by implication, matters which are neither stated or implied need not be proved at the trial, and there is no room for intendment or presumption; as the intendment must arise from the verdict, when considered in connection with the issue upon which it was given."

The rule laid down by Chief Justice BARON GILBERT, and reiterated by Lord MANSFIELD, and approved by Chancellor KENT, in 17 J. R. 448, is, "if any thing essential to the plaintiff's action be not set forth, though the verdict be for him, he cannot have judgment, because, if the essential parts of the declaration be not put in issue, the verdict can have no relation to it; and if it had been put in issue, it might have been found false." 11 Wend. R. 415. And Ld. MANSFIELD has said, "that a verdict cures a title defectively stated, but not a defective title."

We will now proceed to test the first and second counts in the declaration by the authorities and principles above cited and laid down. The first count does not state that Henness was liable on the note, or that it contained any promise, by him, to pay any given sum of money. It omits to state to whom the note was payable, and it does not show any title in Holliday to the note, inasmuch as it neither stated that it was made payable to him, or endorsed over to him, or delivered to him in any way whatever. And it is questionable whether it contains any promise or undertaking, by Sevier, to sue or collect the note, either expressed or implied. It fails to state, in legal language, by whom the fee or reward was to be paid to Sevier for the collection and prosecution of the suit. As to the allegation "that Holliday caused the note to be delivered to Sevier, and Sevier received it to collect for the use and benefit of Holliday," it certainly does not amount to a substantive averment that Henness was liable to pay, or that Holliday was authorized to receive the money when collected. It may, and probably does show the object of the parties in giving and receiving the note, which was to bring suit upon it; but it is not justly inferable, from the object and intention of the parties, that the suit, when brought, would be for the benefit and use of Holliday; because, in law, he is not entitled to the proceeds of the note, unless he is shown to be the legal or equitable owner of the note. The same averment might, with equal truth, be made if Holliday possessed him-

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self of the note by a fraud or by a tort. There is no title to the note stated in Holliday, nor is it necessarily implied in any other allegation arising upon the pleadings or verdict. There are, in our opinion, no facts stated which could not be proven, without, at the same time, establishing Holliday's title to the note, or to the proceeds of it. The count does not show that Holliday was payee, endorsee, or even that he ever had possession of the note; and, therefore, there is a total omission of a material fact, which has no connection with any other fact alleged or found. Is there not, then, something essential to the plaintiff's right of action which is not set forth? or in other words, does not the count contain a statement of a defective title which is not aided by verdict? There is no allegation in the count that the note was due at the time of bringing the suit, or at the time that Holliday caused the same to be delivered to Sevier for collection; and, consequently, it does not appear, either by any allegation, or by any inference from the verdict, that Henness had ever become liable to pay the note, at all, to any body. And, therefore, a failure upon the part of Sevier, to prosecute the claim, or to collect the money, would not make him responsible, if the individual who executed the note was not legally bound to pay it. The allegation that Henness made the note, calling for \$133, certainly does not show for whose benefit the note was executed; nor does it contain any express or implied promise to pay the same; for there can be no promise, unless there be some person to whom that promise was made. The expression, "*calling for so much*," means that the amount mentioned is the sum appearing upon the face of the note, but it is not an allegation that such sum was then due on the note. Nor does it show to whom due; or that the party making the note was legally bound to pay it. The second count is still more radically defective than the first; in fact, it scarcely has the form or substance of a count; and all the objections that lie to the first apply with increased force and effect to the second count, and show it to be totally defective in stating a good cause of action. The question then recurs, are these defects aided or cured by the legal presumptions in favor of the verdict and judgment, or by the statute of jeofails and amendment? If the view we have taken of the subject be correct, they certainly are not; for they

are not such defects, imperfections or omissions as may be supplied by a verdict, or by the statute, because they shew a defective title, and *not* a title defectively stated. No proof, at the trial, can make good a declaration which contains no ground or cause of action. The defects, contained in the two counts, are not implied in, or inferable from the finding of the jury, or from any allegation contained in the declaration; consequently, they are destructive of the plaintiff's right of action.

The receipt, that was offered in evidence, if it proves any thing, certainly tends to disprove the allegations in the first and second counts. The legal inference drawn from the counts, if they warrant any conclusion at all, is, that the note was executed by Henness to Holliday, or assigned over by the holder to him, for his use and benefit. The receipt, adduced upon the trial, justifies no such conclusion. It merely shows that Sevier received of Holliday a note, of \$133, for collection, against Joshua J. Henness, drawn in favor of William English. It does not show that Holliday was the owner or holder of the note. It clearly establishes the fact, that the note was executed by Henness, and was made payable to English, and, of course, he was the legal owner thereof, and entitled to the proceeds on its recovery. It proves possession and interest in another, and not in Holliday, because, English being the legal owner of the note, the presumption is, that he had the possession of it, and was entitled to the proceeds after recovery. Then, so far from establishing the allegations in the first and second counts, it tends to disprove and contradict them. For it shows that Holliday had no interest whatever in the note; and if that be the case, Sevier could not be held answerable to him for a breach of contract, in failing to collect it, as an attorney. The introduction of the receipt, as evidence to sustain Holliday's right of action, was, therefore, improperly admitted by the court.

The second bill of exceptions has, in our opinion, nothing to do with the question now before this court. If the receipt was evidence for any purpose at all, to sustain the plaintiff's declaration, it ought and should have been permitted to go to the jury. The reason assigned by the court for admitting it cannot be called in question, or have any bearing upon the case. It is certainly not an instruction given to the

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jury, nor does it appear that the jury heard it. It is merely the assigning of the reason for a decision, about which the counsel differed. The admission or rejection of the testimony offered, is the fact to which the court look, and not the reason upon which it is predicated.

The party will not be allowed to prove more than he has alleged in his declaration, and where he omits to allege a fact essential to the gist of the action, and which is not involved in the pleadings, or inferable from the finding, he fails to show a good cause of action; and, consequently, no valid judgment can be pronounced in the premises. The court below, in the second bill of exceptions, in the opinion which they have given, state that "the receipt was evidence conducing to prove a privity of contract between the plaintiff and defendant." No privity of contract was alleged in the declaration, nor is there any interest averred, which raises a privity of contract. For it was certainly competent for Holliday to contract with Sevier as the agent of English; and in such case, it cannot be pretended that there could be any privity of contract.

The two counts attempt to set forth a contract, but wholly fail to do so in legal form or effect, and they do not disclose any privity of interest which makes such an agreement.

The counsel of the defendant in error is mistaken in supposing that the court, in their previous opinion given in this case went upon the supposition that the action was founded upon the receipt. They certainly intended to convey no such idea. The opinion proceeded upon the principle, that the plaintiff below, having failed to show any legal or equitable interest in the note or its proceeds, he, of course, could not be injured or damnified by a breach of contract on the part of the defendant. Having no interest in the note, made by Henness, he could sustain no injury by Sevier's failure to prosecute the suit or collect the money. Whatever might be Sevier's liability on the receipt, still, Holliday could claim no benefit from it, as he was not legally or equitably interested in its proceeds. The argument for a rehearing assumes, as its basis, that Sevier made a legal and valid contract with Holliday for the collection of the note, and the breach of this contract constitutes the gist of the plaintiff's action. This contract, it asserts

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that the declaration discloses, and that it is legally inferable from the facts alleged, and from the finding of the jury and judgment of the court below. The argument assumes that to be true which constitutes the question in issue between the parties. If its premises be once granted, its conclusions unquestionably follow. We have endeavored to controvert the position that there is any legal or valid contract disclosed by the declaration, or upheld by the proof, or inferable from the verdict and judgment. If the authorities we have cited, and the reason adduced in support of them, be correct, then the two first counts in the declaration wholly fail to establish a good cause of action; and, therefore, the plaintiff had no right to succeed upon them. The third count is in trover for a certain other note, for \$133, made by Joshua J. Henness, the proper goods and chattels of Peter Holliday. In form, trover is a fiction, says Lord MANSFIELD, but in substance, it is a remedy to recover the value of a personal chattel wrongfully converted by another to his own use. The injury lies in the conversion, which is the gist of the action; and it is for the recovery of damages to the value of the thing converted. To entitle the plaintiff to recover, two things are necessary: First, property, either general or special, in the plaintiff; and, secondly, wrongful conversion by the defendant. The conversion may be, first, by a wrongful taking of the thing converted, or by an illegal assumption over it, or by a wrongful detention. *Bacon Ab. Trover, B*; 2 *Saunders* 47, *c. n. l.*; *Payne vs. Doe*, 1 *T. R.* 56; 1 *Chit. Plead.* 148, 51 52, 53. Title in another is a good defence to defeat the action of trover. Whatever shows either a want of title in the plaintiff, upon general issue, or disproves conversion by the defendant, will defeat the action; and this position is sustained by all the authorities. *Kennedy vs. Strong*, 14 *J. R.* 128; *Schumerhorn vs. Van Vecklenburg*, 11 *J. R.* 529; 3 *Starkie* 1487; 2 *Saund.* 47, 873, and 9; 7 *T. R.* 12. The declaration, in trover, should state that the plaintiff was possessed of the goods as his own property, and that they came to the possession of the defendant by finding. The omission of the former words is not material after verdict, and the finding is not traversable. The count, in the declaration now under consideration, would certainly be fatally defective upon a general de-

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murrer, for it wholly fails to state that the plaintiff was possessed of the note, as of his own property, or that it came to the possession of the defendant by finding. It is probable, however, that these defects are cured after verdict. And so we have regarded them in the present instance. The plaintiff, in the action, has wholly failed to support this count, because the evidence introduced upon the trial disproves his title to the note, and clearly establishes the interest in another.

It is certainly true, as has been argued by the counsel, that every legal inference and presumption will be indulged in by this court which the pleadings and proof will warrant in favor of the verdict and judgment below. But where there is no basis to rest such presumptions upon, they are wholly inadmissible. For where the averments, in the declaration, do not, in themselves, show a sufficient title in the plaintiff, no proof adduced upon the trial will supply such omissions, nor can they be aided or supplied by verdict and judgment. In such cases there is no room for the indulgence of presumptions. In the case before us, the defendant below was certainly not guilty of a conversion, because he has not assumed to exercise any illegal ownership over the note. Nor has the plaintiff been injured in the slightest degree, by his conduct in regard to that matter, whatever it may be. The introduction of the receipt, by the plaintiff, according to our construction of it, clearly proves possession and title in another; which unquestionably defeats his own right of action. Where the plaintiff possesses no title, the defendant cannot be held bound to him for an unlawful conversion. This being the case, it necessarily follows that the plaintiff, by his own showing, has no right to recover on his count in trover. The judgment of the court below must therefore be reversed; and leave given the parties to amend their pleadings, if asked for.

JAMES H. WALKER *against* THOMAS H. BRADLEY.ERROR to *Hempstead Circuit Court.*

An agreement between a judgment creditor and his judgment debtor, that a writ of garnishment upon the judgment shall not issue against a person indebted to the debtor, is a mere *nudum pactum*; and if it were not, it would be no ground for a dismissal of the suit.

In a suit commenced by writ of garnishment under the Territorial statute, the plaintiff had the right to deny the truth of the answer, and to empanel a jury to try the issue so made up.

Consequently an action of garnishment does not go off, like an injunction, on the coming in of answer; nor can the defendant move to dismiss on its coming in.

If the answer of the garnishee disclose funds and available means placed in his hands by one of the judgment debtors, for the purpose of paying off the same debt, it is sufficient to charge the garnishee.

Levying an execution on the property of a judgment debtor is no satisfaction, where the property does not remain in possession of the Sheriff, but is re-delivered to the defendant on his giving a delivery bond.

And a levy upon the property of one defendant is no satisfaction as to his co-defendant. Nothing but *actual* satisfaction releases the co-defendant.

And such a levy upon the property of one defendant cannot be set up as a defence in an action of garnishment against the debtor of the co-defendant.

The reception by the officer holding the execution, of bank notes, &c., to the full amount of the execution, from one defendant, is no defence to a person garnished as debtor of a co-defendant, unless the plaintiff authorized the receipt of such funds, or accepted them after they were received; because, otherwise, it was no *actual* satisfaction.

The true rule is, that where a levy under execution is made upon personal property of sufficient value to satisfy the execution, and the property so seized does not again come to the possession of the debtor, the levy is a satisfaction, as to that debtor, and as to him only. But if the debtor again receive the goods, there is no satisfaction.

The satisfaction dates from the time of the levy. So long as the property remains in the hands of the Sheriff, or *in custodia legis*, the debtor has the general property in it, with which he does not part until the sale, for until then it is possible that he may again take the property.

Actual satisfaction by sale of one defendant's property is a satisfaction as to other defendants.

No matter of defence, arising after action brought, can be pleaded in bar *generally*; but only in bar of the *further* maintenance of the suit. If it arise after issue joined, it must be pleaded *puis darrein continuance*.

The garnishee, upon answering, might produce in court the goods, moneys, credits and effects in his hands, and claim to be discharged with costs.

If he failed in this, and the court ordered him to proceed and collect the notes, accounts, receipts, &c., in his hands, and he made no objection to such order, he could be subsequently ruled to account; and if such rule being made he rendered no account, nor discharged himself from liability by showing that he could not collect the debts in his hands, the court was right in decreeing against him for the whole amount of evidences of debt before then admitted to be in his hands.

Absent, RINGO, *Chief Justice.*

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This suit was commenced in Hempstead Circuit Court, by filing a bond for costs, and issuance of a writ of garnishment by Bradley. The original writ of garnishment was issued on the 6th of January, A. D. 1835, and not being served, an alias writ was issued on the 7th August, 1835, which was duly served.

The substance of the alias writ is, that Bradley, on the 21st of November, A. D. 1835, in Hempstead Circuit Court, had recovered judgment against Joshua T. Walker, Simon T. Sanders, and James W. Walker, for \$7,144 70 cts., debt, and \$208 38 damages, and costs of suit, amounting to \$100: that said judgment remains in full force, &c., in no way reversed, vacated or satisfied: that having cause to believe that James H. Walker is indebted to the defendants, individually or collectively, and has in possession their goods, chattels, &c. And, therefore, the writ commanded James H. Walker to be summoned to appear and answer what might be objected against him.

At the return term of the writ Bradley filed his interrogatories. At the same term the garnishee filed his motion to *quash*, dismiss, and set aside the proceedings in the case, because they were unauthorized by law, illegal and irregular; and also because they were contrary to an express written agreement, entered into between Bradley, by his agent Trigg, and Joshua T. Walker, which agreement is set forth in the motion. The motion was overruled.

On January 30, 1837, the garnishee filed his answer to the interrogatories. He admitted, that when the writ was served, he had in his hands sundry notes, accounts, and receipts, placed in his hands by Joshua T. Walker, one of the defendants, for the purpose of paying off the judgment aforesaid, and amounting, in all, to the sum of 3,290 76 cts., a schedule whereof is made part of the answer, and on which about two hundred dollars had been collected by him—and denying any other indebtedness, or the possession of any other goods, &c., of any of the defendants.

At April term, 1837, an order was made that the sum of one thousand dollars, paid to Bradley's agent by the garnishee, should be considered as a payment in discharge of the original judgment to that amount, and as so much in exoneration of the garnishee; and that

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the garnishee should proceed to collect the debts admitted in his answer to be due.

At the October term, 1838, the defendant again moved to dismiss the suit, on the ground that the whole debt, interest, and costs, had been paid by and collected of James W. Walker.

At April term, 1839, on motion of the plaintiff, the garnishee was ordered to account forthwith, before the court, for the amount of money by him received, the goods, chattels, credits, or effects of the defendants; a true copy of which order was served on the garnishee: and at the same term the motion to dismiss, filed at the previous term, was overruled.

At the same term the garnishee filed his motion and affidavit, to set aside the rule entered against him: the motion is to set aside the rule requiring him to account. The affidavit states that on the original judgment an execution issued to Sevier county, on the 25th of Feb., 1836, which was executed by levying on eight slaves of James W. Walker: that a delivery bond for said slaves was given: that on June 13th, 1836, another execution issued in like manner to Sevier county, against the original defendants and the security in the delivery bond, which was executed by levying on eight negroes, of sufficient value to command the amount of judgment, interest, and costs: that on the 4th of May, 1837, another execution issued to Sevier county against the defendants and said security, commanding the Sheriff to sell the negroes levied on, and that the Sheriff of Sevier county certified on said execution that the same was satisfied: that on the 8th February, 1838, another execution issued to Sevier county, against the defendants and security, on which the same sheriff returned that the same was wholly paid, and that he had the same ready to pay over on demand. The affidavit further states that the affiant has been informed, and believes, that a suit is pending in Sevier Circuit Court against the Sheriff for the money so collected and received of James W. Walker in full of said judgment and recovery. The affidavit refers to the several executions stated to have issued, and they are brought up here as part of the record. They show levies, and the taking of a delivery bond, as alleged in the affidavit, and on the *venditioni exponas*, which issued for \$7,144 70 cts. debt, and \$203 38 damages, and costs, subject to

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a credit of \$3,014, paid on January 1, 1835, as by endorsement on previous writs, and on which is endorsed a further credit of \$1,000 paid to *Trigg*, agent of *Bradley*, and ordered to be credited on the record as before mentioned, the Sheriff of Sevier county returned that James W. Walker "produced to him the receipt of the agent of *Bradley* for a draft on E. Myrick for \$2,000, which is herewith returned; and that said Sheriff tendered said receipt, together with the sum of \$2,039 01, the residue due on the execution, to Hubbard, attorney for *Bradley*, in Tennessee, Mississippi, Alabama, Louisiana and United States Bank notes, silver, and one copper cent, all which Hubbard refused to receive and accept as a payment of the execution, alleging that he would receive nothing but gold and silver in payment."

The same return was made on the last execution issued.

At November term, 1839, the death of James W. Walker, one of the original defendants was suggested and admitted; and the motion to dismiss was overruled; and the record then proceeds to state, that "it appearing to the court that the said James H. Walker has paid H. the sum of \$1,000 to the said *Bradley*, admitted by the said James to be in his hands, money of the said Joshua T. Walker, and that there remains in the hands of the said James H. Walker the sum of \$2,290 76 cts., admitted by him to be in his hands, moneys of said Joshua T., and he having failed to account, under the rule heretofore entered in this case; therefore, on motion of *Bradley*, it is considered that he have and recover of said James H. Walker the sum of \$2,290 76 cts., the residue of the moneys so by him admitted as aforesaid; and that said James H. Walker recover of *Bradley* his costs."

TRIMBLE, for plaintiff in error:

The counsel for the defendant in error will contend that the Circuit Court could enter no judgment against the garnishee, he having filed an answer according to law, and the prayer of the plaintiff, (*Bradley*,) in his allegations and interrogatories, unless said garnishee had failed or refused to answer, or had not answered fully; for it is only on one or the other of the foregoing failures of the garnishee that the court can proceed to judgment. But in this case, the garni-

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shree having answered, and in his answer tendered the money, credits, and effects in his hands, to the court, he was, by the statute, entitled to an immediate discharge, with costs. The statute, giving this remedy, is special, and in derogation of the common law, and, therefore, must be strictly pursued. 9 *Law Library* 695-6. Its provisions ought not to be extended beyond the manifest and expressed intention of the Legislature. In cases where the garnishee answers, and tenders the goods, chattels, &c., &c., to the court, as in this case, he is entitled to a discharge. *Old Digest*, page 347, Sec. 93. Again, the judgment, which the statute authorized the court to render against the garnishee, is a penalty which attaches where he fails or refuses to answer, or does not answer fully; (*ib.*) and this is an additional reason why the statute should be strictly construed.

In this case the answer is made so that, in this respect, the garnishee is not liable to the penalty of a judgment against him, for failing or refusing to answer. He is not liable to the penalty of a judgment against him for not having answered fully, because there is no allegation, or even suggestion, that the answer is not full. *Digest*, p. 347, Sec. 93.

It is admitted by the counsel for the plaintiff in error, that where the garnishee answers, but does not produce the goods, chattels, &c., &c., to the court, he would not be entitled to his discharge, with costs, and the court might enforce their production by attachment, founded upon an order on the garnishee to produce the goods, &c., &c., but could render no judgment against him, either for the amount of the original judgment, or for a sum equal to the value of the goods, &c., &c., in the hands of the garnishee.

In this case, Walker, the garnishee, has not been guilty of any default that would authorize a judgment against him, and having answered and there being no allegation that the answer is not full, the law does not warrant a judgment against him, for the value of the goods, &c., &c., in his hands. The law does not authorize such a judgment under any circumstances, where there is an answer full; but if it did, can the court render such a judgment without the intervention of a jury, to ascertain the value of the goods, chattels, credits and effects

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in the hands of the garnishee? In this case, what was the value of the notes and accounts in the hands of the garnishee?

The subsequent order of the court, directing the garnishee to proceed to collect and account at the next term, and the order at the April term, 1839, to account, forthwith, to said court, were totally unauthorized by the statute, and were *coram non judice*. The loss of which is made the grounds and foundation of the judgment subsequently rendered against Walker, the garnishee.

• Second. In the second place, the counsel for the plaintiff in error would urge that the original judgment on which the proceedings against him are founded, had, before, and at the time of the rendition of judgment against him, been paid, discharged, and satisfied. First, it was paid, as is evidenced by the return of Wm. White, Sheriff of Sevier county, on the third and fourth execution issued from the Hempstead Circuit Court, and which came to his hands, as Sheriff, to be executed: 10 *Wheaton* 346, 7, and 8; 1 *Burr.* 457; 4 *Dall.* 235; 6 *Taunton* 79, 80, 81, &c. If it be considered as a case of acceptance of bank notes, to the credit of the original defendants, the case of 10 *Wheaton* 346-7, will govern this case, as well as of actual payment. Second, the original judgment had been discharged by a levy on goods, &c., sufficient to satisfy the execution, see 12 *J. R.* 207, *Hoyt vs. Hudson*; 4 *Cow.* 417, *Ex parte Lawrence*, where the court say that, a levy on personal property, sufficient to satisfy the execution, operates, *per se*, as an extinguishment of the judgment; see also *Clark vs. Withers*, 2 *Ld. Raym.* 1072; 7 *Cow.* 21, where the principle of the case, *ex parte Lawrence*, is recognized and affirmed. Suppose an action of debt had been brought, the former levy would have been a good defence, if pleaded. 7 *Cow.* 315. Goods taken in execution are in the custody of the law; 2 *Wend.* 478, and the cases there cited. When goods sufficient to satisfy the judgment are seized on *fi. fa.* the debt is discharged, &c. 4 *Mass. R.* 403; 9 *J. R.* 98; where *Holt*, Chief Justice, is quoted: "where the Sheriff levies on goods to the value of the debt, the defendant is discharged, whatever may become of the goods, &c." See also, 2 *Pickering* 590; see also, 1 *Salk.* 328, *Clark vs. Withers*; 7 *J. R.* 426, *Reed vs. Pryor* and

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Staats; 6 *Wend.* 562, *Woods vs. Torrey*; 8 *Cow.* 194, *Ontario Bank vs. Hallit*.

If debt had been brought on the original judgment, a plea of levy, or payment, would have been good: 2 *Ld. Raym.* 1072; 7 *Cow.* 315; and what would have been a good plea for the original defendants would discharge the garnishee—he having brought the matter before the Circuit Court, in his affidavit, by way of an amended, or additional answer? The garnishment, in this case, is as a suit brought on the original judgment; and the appropriate mode of defence is by answer.

By taking the forthcoming and delivery bond, mentioned in the return on the first execution, there was a satisfaction of the original judgment and execution. 1 *Marsh.* 20, 21.

A sheriff, with one execution in his hands, is the legal, general, and public agent of the plaintiff to collect, and had a right to take bank paper in payment and satisfaction of the debt, in the absence of any instructions by the plaintiff to the contrary. Bank paper is the ordinary currency of the country, the representative of money, and uniformly paid and received as such. 10 *Wheaton* 346, and the cases there cited.

The general authority of an attorney ceases with the judgment, or, at least, with the issuing of an execution: 8 *J. R.* 361; 10 *J. R.* 221; and it would seem that the agency of the Sheriff begins where the authority of the attorney ceases.

It is in the discretion of the court to receive a plea. *Puis darrein continuance*, after more than one continuance after the time of the matter of the plea arises, and putting in the plea. 1 *Chitty* 456; 5 *Bacon title Pleas and Pleading*, (2) pages 143, 144; 10 *J. R.* 161, *Morgan and Smith vs. Dyer*.

PRIZE, Contra:

The first position assumed here by the plaintiff in error is, that no such writ of garnishment was by law authorized to be issued. Not knowing upon what ground this position rests, we shall merely refer the court to that section of the act of November 7, 1831, placed in Territorial Digest as sec. 89 of judicial proceedings, p. 346; which

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authorizes precisely such a writ to issue, in precisely such a case as the present. The writ follows the language of the statute as literally as could possibly be done, and shows upon its face every fact, and contains every averment and recital necessary to constitute a valid, legal writ.

It is assigned for error that the court below refused to dismiss, quash and set aside the proceedings, on the first motion of the plaintiff in error, made at the return term. A bare statement of the grounds on which the motion was predicated, will demonstrate the futility of this assignment of error. The grounds were, that the writ was unauthorized by law, illegal and irregular. It was authorized by law, and every way formal, and even with the strictest regard to technical exactness. The further ground was, that the issuance of the writ of garnishment was contrary to an agreement in writing, between the creditor by his agent, and one of the original defendants. I will not waste time in offering argument or producing authority, to show that this could not be a ground for a motion to quash, set aside, and dismiss. The argument as set forth is a mere *nude pact*, and if it were not, it was never before heard that such matter was made the foundation of such a motion.

It is also assigned for error that the court below did not dismiss the proceedings upon the filing of the answer; but it does not appear that any motion to that end was made—and if there had been, the court could not have sustained it—because an action of garnishment does not go off, like an injunction, on the filing of an answer to interrogatories, but by statute the plaintiff has the right to deny the truth of the answers, and empanel a jury to try the issues raised. In the present case the answer was sufficient to charge the garnishee—for he showed funds and available means placed in his hands by one of the judgment debtors for the express purpose of paying the very debt for which he was garnisheed.

The residue of the grounds assigned for error, present the isolated question arising out of the facts appearing in the motion and affidavit of the garnishee, filed at April term, 1839. The facts upon which this question of law depends, are, briefly, as follows:

The writ of garnishment issued January 6, 1835—the alias writ,

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August 7, 1835, upon a judgment obtained November 21, 183 . On the 30th January, 1837, the answer to interrogatories was filed. On the 25th February an execution on the original judgment was levied on negroes of one of the defendants, of sufficient value to pay the debt, and a delivery bond taken. June 13, 1836, an execution issued on the delivery bond, which was in like manner levied. On 4th May, 1837, a *venditioni exponas* issued, and was returned satisfied by receipt of plaintiff for part, and by bank notes of different kinds, silver, and one cent, received by the Sheriff for the residue, all which the plaintiff's attorney had refused to receive.

The question of law is, whether a levy made upon property of the judgment debtor, under execution against him, is a discharge of a garnishee, against whom proceedings had been instituted prior to suing out the execution; and whether, while he admits his indebtedness to the judgment debtor, he is entitled to be relieved from accounting, and to have the proceeding against himself dismissed, upon motion and affidavit alleging these facts? The further question, whether the fact of the receipt by the Sheriff on the execution, of bank notes, which are not a legal tender, and which the plaintiff has refused to receive in satisfaction, operates a discharge of the garnishee from liability to account, and authorizes him to demand a dismissal of the garnishment, is involved in the first question, and amounts to the same thing.

Let us examine then, first, as to the effects upon the rights and liabilities of the garnishee of a levy so made; and of such a payment made to the Sheriff: and second, as to the proper method of taking advantage of it by the garnishee.

First, as to the levy and payment. The third resolution in *Clerk vs. Withers*, 1 Salk. 322, is that upon levy under an execution, where the Sheriff returned that he had seized goods to the value of the execution, but they remain in his hands for want of buyers, the defendant is discharged, because the plaintiff having made his election, and the defendant's goods being taken, no further remedy could be had against the defendant, but against the Sheriff only.

The same case is much more fully reported, in 6 Mod. 290, where it is said, that the case having been twice solemnly argued at the bar,

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the court a second time affirmed the judgment. By the whole court it was declared that the defendant was discharged of the debt, by seizure of goods to the value, and might plead that matter in discharge; and if the money had been levied by sale he might do it. And for this they referred to *Langdrew vs. Wallace*, 1 *Lutw.* 588, which see as *Langdon vs. Wallis*, 1 *Lutw. by Wils.* 181. And that if the money be not levied, but goods to the value seized, he might plead that his goods, *ad valentiam*, &c., were seized. GOULD, J., further quoted as law a case of debt on bond in which two were jointly and severally bound, against one of the obligors, who pleaded a judgment against his co-obligor, and a *fi. fa.* thereon, and goods seized to value, and no return made; and it was adjudged that if the former action were against himself, it had been a good plea, but the doubt was because it was against another. See the case thus referred to, as *Dyke vs. Mercer*, 2 *Shower*, 394. And see also *Clerk vs. Withers*, reported nearly as in 6 *Mod.* in *Ld. Raym.* 1072.

Some of the decisions have gone so far as to hold that after a levy, the general property in the goods no longer remains in the debtor. This notion seems to have been founded on the case of *Clerk vs. Withers*, quoted above, and *obiter dicta* in *Wilbraham vs. Snow*, as reported in 1 *Mod.* 30, 1 *Lev.* 282, and 1 *Vent.* 52. In the report of that case in *Levinz*, the court held that the Sheriff had a special property sufficient to maintain trover; and RHELYNGE, C. J., said "the property is altered from the owner, and given to the party at whose suit," &c. But with the reporter, we may well say *quære* of this. So in 1 *Mod.* 31, MORETON, J., says that the property, after seizure, is not in the defendant. In 6 *Mod.*, quoted above, POWELL, J., said the same; but he again said that if by any accident the execution determine, the debtor shall have his goods again.

In *Ladd vs. Blunt*, 4 *Mass.*, 403, PARSONS, C. J. said "when goods sufficient to satisfy the judgment are seized on a *fieri facias*, the debtor is discharged, even if the Sheriff waste the goods, or misapply the money arising from the sale, or does not return the execution. For by a lawful seizure the debtor has lost his property in the goods. And POWELL, J., in 6 *Mod.*, as above, and PARSONS, C. J., in *Ladd vs. North*, 2 *Mass.* 517, seem to have considered the general property,

in the interim, between levy and sale, to be abeyance. But all this is now repudiated, and never was in fact the law. That, after a levy, the general property remains in the debtor until the sale, was held in *Milton and Eldington's case*, *Dyer*, 98, No. 57; and in *Ayer vs. Aden*, *Yelv.* 44. In *Lomthal vs. Tompkins*, 2 *Eg. la. Abr.* 381, *Ld. HARDWICKE* says the property of the goods continues in the defendant till execution executed, and the same thing is decided in *Payne vs. Drew*, 4 *East*, 523. In *Blake vs. Shaw*, 7 *Mass.* 506, the court say that the general property in goods is not changed until a levy and sale under execution. And in *The King vs. Wells and Allmett*, in the *Exchequer*, reported at 16 *East*, 278, *Ch. Bar.* McDONALD said that the property is in no sense, and to no purpose in the world altered, either by delivery of the writ, or by the actual taking possession of the goods.

In *Bayley vs. French*, 2 *Pick.* 590, PARKER, C. J., said, "it is true that when the goods of a debtor are seized in execution, it is a payment *pro tanto* to the value of the goods, whether the officer lawfully dispose of them or not, but this is a privilege which the debtor may waive; for if the officer convert the goods to his own use, or otherwise unlawfully dispose of them, without doubt trespass or trover will lie for the debtor—in which case perhaps his debt remains. See also the authorities commented on in *Hotchkiss vs. McVickar*, 12 *J. R.* 403. So in *Hoyt vs. Hudson*, 12 *J. R.* 207, it was held that where a Sheriff has once levied under an execution, property sufficient to satisfy it, he cannot make a second levy.

And for the principle that a levy on personal property, sufficient to satisfy the execution, is an extinguishment of the judgment, see *Wood vs. Torrey*, 6 *Wend.* 562; *Ex parte Lawrence*, 4 *Cow.* 417; *Jackson vs. Bowen*, 7 *Cow.* 21; *Ontario Bank vs. Hallett*, 8 *Cow.* 194. In the case last quoted it is further decided, that a levy, in virtue of an execution, upon a judgment obtained as collateral security for another judgment, is not a satisfaction of the latter; and that a levy on goods of a surety, does not discharge the original debtors.

In *Brown vs. Wotton*, *Yelv.* 67; *Cro. Jac.* 73, it was held that where two are bound, jointly and severally in a bond, a recovery and execution against one was no bar against the other, without satisfaction.

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In *Porter vs. Ingraham*, 10 Mass. 88, it was held, that where the endorsee of a promissory note had recovered against the two promisors, and one of them had been committed in execution, he was still entitled to his action against the endorser, notwithstanding the jailer, after liberating the prisoner, had received the amount of the judgment, and tendered it to the assignee of the judgment.

In *Shepard vs. Rowe*, 14 Wend. 260, the court said, that a levy upon sufficient personal property to satisfy an execution, is a satisfaction of of the debt; and that the reason assigned was, that "by means of the levy the debtor is deprived of his property. It is not so in the case of a levy upon *real estate*. The debtor, notwithstanding the levy, holds the title and possession, and is in the enjoyment of the profits of the land. There is no satisfaction until sale." And here it will be remembered, that in the present case, the slaves, when levied on under the first execution, were released forthwith, upon the giving of a delivery bond. When again levied on under the second, they were returned by the Sheriff to the debtor; and it does not appear that, upon the *venditioni exponas*, they were levied on at all.

In *McGinnis vs. Lillard*, 4 Bibb 490, the court say that, "upon an examination of the doctrine applicable to this point, not an instance can be found of a total discharge from a judgment, except in those cases in which an agreement was made between the parties, whereby a distinct cause of action was created, founded on the consideration of a discharge of the old debt; or *where the property in execution remained, in legal estimation, in the custody of the officer, and as such, liable to be taken and exposed to sale, by him, in satisfaction of the debt;*" and the court, therefore, approved of the decision, that where two were jointly and severally bound, and execution had against one, and his goods *seized* but not *sold*, that this could not be pleaded in an action of debt against the obligor, because it is no *actual* satisfaction. For as each was liable for the whole debt, and the property of one had not been seized; therefore, until the debt was *actually* satisfied, he could not plead in bar the levy of the execution upon the property of the other.

Taking these decisions together, they establish the law upon this subject to be as follows: that where a levy, under execution, is made

upon personal property, sufficient to satisfy the execution, and the property, so seized, does not again come to the possession of the debtor, the levy is a satisfaction of the execution, although the property is wasted or misapplied by the Sheriff: but if the debtor again receives the goods levied on, there is no such satisfaction. And although, if he does not retake them, the satisfaction dates from the time of the levy; yet so long as the property remains in the hands of the Sheriff, or in other words, *in custodia legis*, the debtor has the general property in the goods, and does not part with it until the sale; for, until the sale, it is possible that he may again take the property.

And the law is, further, that where there has been *actual satisfaction* of the debt or judgment, by sale of the property of one debtor or defendant, it is a discharge of the other debtors or defendants: but where satisfaction is worked by the levy without sale, only the debtor or defendant whose goods are levied on is discharged, and his co-defendant remains still liable, because the plaintiff has had no *actual satisfaction*.

If we now test the facts of this case, by applying to them the principles thus ascertained, we are certainly warranted in the following conclusions:

First: that the levies made on the negroes of James W. Walker were no extinguishment of the judgment even as to him alone, because the negroes never remained in the hands of the Sheriff, but were, on each levy, immediately re-delivered to James W. Walker, who was never deprived, except for a very brief time, of the possession or profits of them: and for the still more forcible reason, that the Sheriff was acting in strict accordance with law and the dictates of his duty, in returning the negroes, and therefore no action ever accrued to Bradley on the levy made, against the Sheriff—but if any action did accrue, it was for the failure to levy on the *venditioni exponas*.

Second: that much less were the levies an extinguishment or satisfaction of the judgment as to Sanders or Joshua T. Walker, as nothing but *actual satisfaction* would release them; and Bradley might well hold *both* remedies, to wit: against *them* on the judgment, and a suit against the Sheriff for misfeasance in not levying the execution against James W. Walker, or for receiving uncurrent funds, not a le-

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gal tender. It was not necessary that he should release Sanders and Joshua T. Walker, in order to entitle him to an action against the Sheriff—for the Sheriff merely took the place of James W. Walker, just as if he had by neglect, become a co-defendant in the original suit.

Third: that if Joshua T. Walker was not discharged, then undoubtedly the garnishee, who was liable as holding in his hands funds of Joshua T. Walker, and not as being a debtor of James W. Walker, could not take advantage of what might possibly be a discharge of James W., but could not exonerate Joshua T. Walker. The latter still remaining liable, his property in the hands of the garnishee was also liable, of course.

With regard to the position, that the judgment was satisfied by the payment made to the Sheriff, there can be no difficulty. He returns that the execution was satisfied by the production, to him, by James W. Walker, of a receipt of Trigg, agent for Bradley, and by the payment of a quantity of bank notes, with some silver, and one copper cent. There is no proof whatever, upon the record, that the receipt of Trigg was good against Bradley, or proved such a payment as the Sheriff was authorized to credit upon the execution. There is no proof that Trigg was Bradley's agent, authorized to receive the money for him; and, therefore, there is no proof that so much of the judgment, \$2000, ever was paid at all. True, the Sheriff returns that he received the receipt as a discharge for so much—but there is no proof upon the record that he ought, or had any right or authority to do so.

As to the funds paid him, there is no proof or allegation that he was authorized by Bradley, his agent or attorney, to receive such funds, and it is in proof that Bradley's attorney positively refused to receive them. Whether the improper receipt by the Sheriff, of these funds, from James W. Walker, discharged James W. Walker from the judgment, and compelled Bradley to his action against the Sheriff, is a matter not necessary to be discussed, because, not being an *actual* satisfaction, it could not discharge the other defendants, nor the garnishee, their debtor.

We think, therefore, that we have demonstrated that the facts shown by the affidavit, constituted no discharge to the garnishee.

But even if they did, we contend that he could not have advantage of them by motion. He might, possibly, have done so, if they had constituted a discharge for him, by plea in bar *puis darrein continuance*. For certainly a *motion* to quash, set aside or dismiss the proceedings, cannot be predicated on matter of defence arising subsequent to the commencement of the action. Such matter, (and such is the only matter here set out, for it is not pretended that the judgment was satisfied when the writ of garnishment issued,) can only be pleaded against the *further* maintenance of the suit, that is, *puis darrein continuance*. *Howe's Pr.* 431; *Bull. N. P.* 310. Thus, it is the proper method of taking advantage of a discharge under the insolvent laws, obtained subsequent to the institution of the suit. *Broome vs. Beardsley*, 3 *Caines* 172. So Chitty says, (*Pl.* 532,) that no matter of defence arising after action brought, can possibly be pleaded generally, but ought to be pleaded in bar of the *further* maintenance of the suit; and if it arise after issue joined, it must be pleaded *puis darrein continuance*. It is a settled rule, says the court, in *Cobb vs. Curtiss*, 8 *J. R.* 470, that no matter of defence arising after action brought, can be pleaded in bar. And see 1 *Chit. Pl.* 636; *Le Bret vs. Papillon*, 4 *East* 507; *Watkinson vs. Inglesby*, 5 *J. R.* 392; *Bourne vs. Joy*, 9 *J. R.* 221.

And even if advantage could be taken of it by motion, the motion would have to contain every thing which would be necessary in a plea of the same matter; and it would be necessary, positively to aver that the judgment debtor, as whose debtor the defendant was garnisheed, had been and was entirely discharged from the judgment, and in no way further accountable to the plaintiff thereon. Nothing of the kind is contained in the motion; but it is altogether vague, and merely contains statements of the acts and returns of the Sheriff, leaving the court thence to infer the satisfaction of the judgment, and consequent discharge of Joshua T. Walker. There is nothing of that certainty which would be required in such a plea. See *Howe* 432; 1 *Saund. Pl. and Ev.* 3; 1 *Ch. Pl.* 637.

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Moreover, in any event, the suit could not have been dismissed—because the plaintiff was entitled to his costs.

Inasmuch, therefore, as the record abundantly shows the liability of the garnishee, as a debtor of Joshua T. Walker, and the amount of funds of Joshua T. Walker in his hands, and that his creditor never had been discharged from the judgment, there is, we respectfully submit, no error in the record.

LACY, *Judge*, delivered the opinion of the court:

The proceedings in this case are partly according to the practice in courts of chancery and partly according to the practice of courts of law. They are authorized and regulated by an act of the late Territorial Government, approved Nov. 7th, 1831. *Ark. Dig. p. 344, sections 89 to 93.*

It is contended, in behalf of the plaintiff in error, that the court below erred in refusing to dismiss and set aside the proceedings in this case on his first motion made for that purpose. The bare statement of the ground of that motion will be sufficient to prove its futility.

It is said that the writ was unauthorized by law, and therefore illegally issued; and further that the writ of garnishment was contrary to an agreement between the creditor, by his agent, and one of the original defendants. We will barely remark that, the writ issued in conformity to law, and that the agreement as set forth, is a mere *nudum pactum*. And such matter constituted no foundation for a dismissal of the suit.

It is further asserted that the court below erred in not dismissing the proceedings upon the filing of the garnishee's answer. The record does not show that any motion was made to dismiss, and even if there had been, the court could not have sustained it. The statute gives the plaintiff the right to deny the truth of the answer, and to empanel a jury to try the issues formed. Therefore, an action of garnishment does not go off like an injunction, upon filing an answer to the interrogatories put. The answer, in the present case, is sufficient to charge the garnishee, for it shows funds and available means placed in his hands by one of the judgment debtors, for the purpose of paying off the very debt, for which he was garnisheed.

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The other grounds assigned for error, present a single question, arising out of the facts appearing in the motion and affidavit of the garnishee to dismiss and set aside the rule against him to account.

The levies made upon the property of James W. Walker were no extinguishment of the judgment even as to him. Because, on each levy, the property did not remain in the hands of the Sheriff, but was redelivered to the original judgment debtor, who was never deprived of the possession or use, but for a short time. And the Sheriff in redelivering the same acted in strict conformity to his duty; and of course no action accrued to the original judgment creditor on the levy upon the slaves seized in execution. If the Sheriff was liable at all, it was for failing to make a proper levy or legal return to the writ of *venditioni exponas*. The levies were no extinguishment or satisfaction of the judgment as to Joshua T. Walker or Simon T. Sanders. Nothing but actual satisfaction would release them. If Joshua T. Walker was not discharged from the judgment by the levies, then undoubtedly his garnishee, who admitted in his answer that he held available funds in his hands for the purpose of paying off the judgment, could not claim to be exonerated from its liability. If Joshua T. Walker was liable because there was no actual satisfaction of the judgment, of course, his property in the hands of his garnishee was likewise liable.

It is contended that the judgment was satisfied by a payment made to the Sheriff, by the receipt of John Trigg, agent of Bradley, and by the receipt of the bank notes, some silver, and one copper coin, in discharge of the execution.

It is clear to our minds that the Sheriff had no right to make any such return. There is no proof that Trigg was the authorized agent of Bradley to receive of James W. Walker a draft on E. Myrick, payable at sight in New Orleans, for the sum of \$2,000, in discharge of the judgment, or that the amount was ever paid over to Bradley in satisfaction of so much of the judgment; consequently the Sheriff's receipt or certificate on the *venditioni exponas* constituted no legal satisfaction of the judgment as to the garnishee. As to the funds paid, there is no proof or allegation that the Sheriff was authorized by

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Bradley, his agent, or attorney, to receive such funds. But it is in proof that Bradley's attorney positively refused to receive them.

Whether or not the reception of these funds by the Sheriff operated as a discharge of so much of the judgment against James W. Walker, we do not feel ourselves called on to determine, as that point is not legitimately now before us; nor is it necessary for us to decide whether or not the Sheriff rendered himself liable to Bradley for a failure to make a proper levy, or for a false return upon the execution. Be that as it may, the reception of the bank notes did not discharge the other defendants, nor the garnishee, as their debtor. Because the reception was not an actual satisfaction of the judgment as to them or the garnishee. The true rule upon this subject is "that when a levy under execution is made upon personal property of sufficient value to satisfy the execution, and the property so seized does not again come to the possession of the debtor, the levy is a satisfaction of the execution," "although the property is wasted or misapplied by the Sheriff." "But if the debtor again receives the goods levied on, there is no such satisfaction. The satisfaction dates from the time of the levy. So long as the property remains in the hands of the Sheriff or in other words, *in custodia legis*, the debtor has the general property in the goods, and does not part with it until the sale, for until the sale it is possible that he may again take the property." "Actual satisfaction of the debt or judgment by the sale of the property of one debtor or defendant is a discharge of the other debtor and defendants." "But when satisfaction is worked by the levy without sale, only the debtor or defendant whose goods are levied on is discharged, and his co-defendants remain still liable, because the creditor hath had no actual satisfaction of his judgment."

The application of these principles, according to the view we have taken in the present case, clearly demonstrates that the garnishee was not exonerated or discharged from his liability by the levies. And even if the facts as set out in his affidavit constituted a good discharge, it is exceedingly doubtful whether or not advantage of it could be taken by motion to dismiss the suit or quash the proceedings against him. No matter of defence arising after action brought, can properly be *pleaded generally*, but ought to be pleaded in bar of the farther

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maintenance of the suit. And if it arise after issue joined, it must be pleaded *puis darrein continuance*. *Howe's Prac.* 431; *Broome vs. Beardsley*, 3 *Caines*, 172; 1 *Ch. Pl.* 532; *Cobb vs. Curtiss*, 8 *J. R.* 470.

The facts as disclosed in the affidavit upon which the motion to dismiss the suit and set aside the rule to account was founded, accrued after the issuing and service of the writ of garnishment.

Had the garnishee produced in court the goods, moneys, credits, and effects in his hands, he might, according to the requisites of the statute, have claimed to be discharged with his costs. He certainly, in his answer, has not alleged that he tendered the notes, accounts, and receipts to the court, nor has he stated that he holds them subject to its order. His answer simply states the amount of available funds that Joshua T. Walker placed in his hands for the payment of the judgment, and to it is attached a schedule of each particular claim or demand which he exhibits to the court. It admits \$200 was collected out of the accounts. At the April term, 1837, the court made an order directing him to proceed and collect the residue of the notes, accounts, and receipts in his hands, and make report to the next term of the court. To this order he did not object, nor did he show any unwillingness to execute it. He was personally present in court when it was made, and having failed to object to his appointment, it must be presumed that he acquiesced in it, and took upon himself the trust imposed. He did not then allege that the notes, accounts, and receipts were not due and owing from the persons who executed the same, nor did he allege their inability to pay or insolvency. At the same term, he tendered in part payment on the judgment the receipt of John Trigg, for which he was allowed a credit, by order of the court, of one thousand dollars. At the October term, 1838, his motion to dismiss was overruled, and no further order seems to have been then entered in regard to the garnishee's accounting. At the April term, 1839, upon motion of the plaintiff's counsel, a rule was entered against the garnishee to account forthwith, and a copy of it regularly served upon him. During all this time the garnishee never once sought to discharge himself from his liability, by alleging and establishing the fact that he could not collect the money, or had not collected the notes, accounts, and receipts placed in his hands. By fail-

ing to render to the court any legal excuse for disobeying its order, which he had voluntarily assumed to execute, surely he rendered himself personally liable for the amount admitted to be due and in his hands.

At the November term, 1839, the court rendered judgment against him. He even then did not object to his liability upon the ground that he had obeyed the previous order of the court, or that he could not execute it by reason of any inability of his own, or that of the individuals who were owing the claims put in his hands for collection. His failure then to obey the order of the court, and his express acknowledgment that the notes, accounts, and receipts, were still in his hands, was certainly sufficient to render him personally liable, and to authorize the court to decree against him.

The court proceeded to decree against him because he admitted that he possessed available means and effects, placed in his hands by Joshua T. Walker, one of the original defendants for the purpose of paying off the judgment, upon which the writ of garnishment issued. Having failed to make a legal tender to account, or to produce the notes, accounts, and receipts in his hands to the court, he of course became personally responsible for as much as he admitted to be due in his answer. Although it is true, as contended by the counsel for the plaintiff in error, that his answer was full and complete as to all the interrogatories filed, still he has no right to claim to be dismissed with his costs, if his answer shows that he has available means in his hands which he retained, belonging to the original judgment debtor; neither is it necessary for the plaintiff to put the allegations of his answer in issue, and demand a jury for determining the truth of it. As we before remarked, the proceeding in this case is partly according to the practice in courts of chancery; and in such cases the answer of a defendant will certainly charge him, if he admits a certain amount to be due in his hands, and such also we apprehend is the correct rule in the case now before us. The garnishee first rendered himself liable by his own admissions and showing—he fixed this liability personally upon himself by disobeying the order of the court to account, and by being guilty of laches in the discharge of the duty

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imposed upon him. And, therefore, the court after giving him credit for all the money paid over, rightly decreed against him for the residue admitted to be in his hands unappropriated. The judgment of the court below must therefore be affirmed with costs.

The remaining cases decided at this term are necessarily postponed until the third volume.

AN
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TO
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CONTAINED IN THIS VOLUME.

A

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3. And the rule is the same, whether he pleads generally to the merits or demurs, before or after his motion to dismiss. In either case he waives the objection. *id*
4. Where a joint and several co-obligor was not sued, and it appeared from the declaration that he was still living, it was good ground of general demurrer at common law; and may, perhaps, be a valid objection to a declaration in a suit commenced before the adoption of the Revised Code; where it does not appear in the declaration that the obligors reside in different counties; for if such be the case, the plaintiff should show it by proper averment in the declaration, in order

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5. But the objection that parties who ought to be joined were omitted, was not available, even at common law, on demurrer, unless it appeared in the declaration that they were still living. If this did not appear, the objection could only be taken advantage of by plea in abatement. *id*
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3. The party demurring is required specially to express in his demurrer the particular defect or imperfection which vitiates the pleading; and is prohibited from so expressing in his demurrer any matter which is only cause of special demurrer at the common law; while it is enjoined upon the court to amend any defect or imperfection not so expressed in the demurrer. *id*
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1. Where the entry on the justice's docket was, that *the plaintiff* came and prayed an appeal, and offered A. B. as special: whereupon A. B. came and acknowledged himself jointly bound with said *defendant* to pay the costs and condemnation of said circuit court; signed by the justice; no valid appeal was taken by either party. *Woolford, et al. v. Harrington*, 85
2. There can be no appeal without an order of the justice allowing it, and a recognizance. The mere prayer of an appeal, and offer to give special bail, does not constitute an appeal. Therefore, in this case, there was no appeal on the part of the *plaintiff*. *id*
3. The *defendant* neither prayed nor took an appeal—nor did he enter into a valid recognizance—nor did the justice grant or allow him an appeal. *id*
4. The recognizance is wholly void and nugatory. It contains no valid condition, it is not signed by the parties, and it was taken in a case where no appeal was either prayed or granted. It was made payable to no one, nor did A. B. ever become the security of the defendant in any recognizance. *id*
5. In such case, there being no appeal, the circuit court cannot assume cognizance of the cause; and any judgment which

that court gives in such case is wholly illegal and void. *id*

6. The defendant before a justice, by appealing, precludes himself from taking advantage of any irregularity in the proceedings before the justice. *Ball v. Kuykendall*, 195
7. He cannot, therefore, in the circuit court, plead in abatement the misnomer of the plaintiff. *id*

APPEAL TO SUPREME COURT

1. An appeal may be taken by the defendant, under our statute, after a judgment by default, without first applying to the court to set aside the judgment. *Rose vs. Ford*, 26
2. A party may appeal to the supreme court from the circuit court, upon filing affidavit, without recognizance—the latter being necessary only when he desires a supersedeas. *Childress vs. Foster*, 123

APPEARANCE.

1. Where an action was commenced against two defendants, before a justice, who rendered judgment by default against the defendant without any appearance, and it appears from his docket merely that "the defendant" appealed; if judgment is again rendered by default in the circuit court against *both* defendants, it is error. *Woolford v. Howell*, 1
2. In such case, the entry in the record of the circuit court, of the appearance of "*the parties*," must be considered as applying only to those who were under legal obligation to appear, by service of process, or otherwise. *id*
3. The defendant, by appearing generally, waives all exceptions to the writ or return, or at least is precluded thereby from taking any advantage of them. *Rose v. Ford*, 26
4. But he has no legal right to *appear to*, or *defend* the action, after judgment rendered against him. He then has no day in court. *id*
5. Praying an appeal, therefore, is no such appearance as waives any objection to the writ or return. *id*

ASSIGNMENT.

1. Under the territorial statute of assignments, an assignment was an agreement or contract in writing entered into between the assignee and assignor for a valuable consideration; and was equivalent to drawing a new bill in favor of

- the assignee on the original obligor. *Block, v. Walker.* 4
2. After assignment and delivery, the assignee stood precisely in the same relation to the obligor, as the payee of a bill to the drawer, and thereby acquired the right of action, and was fully authorized to commence and prosecute suit on the bond in his own name *id*
 3. After assignment once made, or become complete, the assignor had no power to release the debt, or any part of it. *id*
 4. The assignment being a contract, entered into by mutual consent of two persons, cannot, when properly executed, be revoked or dissolved, except by the like mutual consent of both. The contract cannot be cancelled, nor their respective rights seriously altered or destroyed, unless both parties agree to their alteration or destruction; and even then, that agreement must be made and evidenced according to the grade and dignity of the contract. *id*
 5. The assignor had no right to strike out and erase the assignment, after he had once executed it, and by delivery it became complete. He would have no right to alter or change the contract or assignment to the prejudice of the assignee or obligor, without their consent or agreement. *id*
 6. Nor can the assignee, after assignment in full and delivery to him, restore the legal interest in the bond to the assignor by the erasure or cancellation of the assignment. He may destroy the evidence of his own claim, but that will not re-instate the legal and equitable interest in the assignor, without any agreement, re-assignment, or re-delivery.
 7. Where, therefore, to debt on bond, brought by A. for the use of B., the defendant pleaded, that before the commencement of the suit, A. made over, transferred, endorsed, and assigned the bond to B., and delivered the bond, so endorsed, to him, and thereby parted with and transferred all his right, title, and interest, of, in, and to the bond to B.; and defendant thereby became liable to pay to B., and that A. has no interest whatever in the suit, it is a good plea in bar. *id*
 8. And a replication, that after the endorsement, B. caused the transfer and endorsement to be stricken out and erased, whereby the legal interest in the bond again vested in A., and A. became entitled to sue, is not good. *id*
 9. There is a broad and marked distinction between the nature of the defence in law which a party may have, and the form and manner of legally interposing such defence. *Small v. Strong.* 198
 10. The statute of assignments of 1807, and the proviso thereto, was designed to preserve to the defendant, as the obligor, or maker of the contract, the full benefit of every legal defence against the instrument assigned, but not to dispense with any law regulating and prescribing the time, manner, or form, of availing himself of it. *id*
 11. The proviso creates no new plea, nor does it define what shall constitute for the defendant a defence at law, but simply preserves to him such defence at law as he may have against the original assignor; and leaves him to make it out in such manner, or by such pleadings as, according to common law or statute, may be interposed as a legal defence to the action in the form in which it is prosecuted. *id*
 12. And further, the statute secures to the assignee a legal right to recover whatever is due on the contract when the assignment is made. *id*
 13. This is a statute of Louisiana, passed where the civil law existed and furnished the rule of decision, as well in regard to the right as the remedy; and it must be understood as referring to that code in all its provisions. *id*
 14. By that code, whenever there exists between private persons a mutual indebtedness, on account of money due, the law so operates upon the debts, as to make them destroy or extinguish each other, from the period of their mutual or reciprocal existence, which happens by the simple operation of law, and without any other act of the parties.
 15. The statute therefore was designed to define, limit, and protect the rights of the assignee, acquired by the assignment; which are, to sue in his own name on the assigned contract, in the same manner as the payee might have done, if no assignment had been made; and to recover the sum really due at the time of the assignment. *id*
 16. The proviso was inserted as declaratory of a right then subsisting in the defendant, which it was not intended to impair or subvert. Therefore, if the assignor was indebted to the defendant before and at the time of assignment, the law extinguished so much of the defendant's debt, as the debt of the assignor to him amounted to; and the residue constituted the amount which the assignor could transfer. *id*
 17. That the assignor was indebted to the defendant in a certain amount at the time of assignment, was therefore a legal de-

fence against so much of the assigned contract, in the hands of the assignee; and it was defences of this and the like kind which were preserved by the statute. *id*

18. But instead of preserving the civil law, as it existed in Louisiana when this statute was passed, the Legislature retained the statute without any modifications of its provisions, while they have entirely discarded the civil law, and adopted in its stead the common law, and statutes of England previous to 4 James 1.

19. The common law, and these statutes, do not recognize the principles of compensation and extinguishment of debts by mere operation of law as it does the civil law; but establish the rule that it is no defence to an action, that the plaintiff is indebted to the defendant as much, or more, than the defendant is indebted to him; and leave the defendant to his remedy by another action; unless the nature of the employment, transactions or dealings are such as necessarily constitute an account, consisting of receipts and payments, debts and credits; and the *balance* only is considered as the debt. *id*

20. No statute of England, working any change in this respect has been in force in this State: and the right of set off here derives its being from the statute of 1818. *id*

21. That statute only intended to admit this defence, when the demand sued for, and that to be set off, are *debts* mutually subsisting between the plaintiff and defendant. *id*

22. Therefore in a suit by an assignee under our statutes, the plea that the assignor had executed a different note, which had been assigned to the defendant, before the assignment of the note sued on, sets up no legal defence; nor does the demand stated in the plea operate an extinguishment of any part of the debt sued for. *id*

23. An assignment of a covenant, under the Territorial Law, passed no legal interest in the covenant to the assignee, so as to enable him to sue on it in his own name: but it unquestionably passed the equity. *Sabin vs. Hamilton.* 485

ASSUMPSIT.

See PAYMENT, 1, 2, 4, 5.

ATTACHMENT.

1. Under the Organic Law of the Terr.

tory, the Legislature of the Territory had ample power to give a Justice of the Peace authority to issue writs of attachment returnable to the circuit court, whether this was a judicial or ministerial act: for they could give him power to do either one or the other act. *Jones, et al. v. Buzzard, et al.,* 415

2. The writ of attachment issued by a Justice and returnable to the circuit court, lay, under the Territorial Law, as well against non-resident as resident debtors, or persons endeavoring to remove themselves or effects beyond the Territory: and upon unliquidated, as well as liquidated demands. *id*

3. The statute was remedial in its nature, and therefore to be construed liberally, to prevent the mischief for which it was enacted. *id*

4. The idea that the creditor and debtor must both have been residents of the Territory is wholly untenable. *id*

5. If the writ under that statute was issued upon an affidavit following the form prescribed by the statute, it was valid. *id*

6. In proceedings under the attachment law, the answer of a garnishee is *prima facie* evidence of the truth of the allegations it contains. *Mason v. McCampbell,* 506

7. But these allegations may be rebutted or disproved by any other competent evidence. *id*

ATTORNEYS.

1. Every attorney regularly licensed, and duly admitted to practice in the courts of this State, possesses a general license to appear in those courts for any suitors who may retain him: but his license is not of itself an authority to appear for any particular person, until he is in fact employed by or retained for him. *Cartwell v. Menifee.* 356

2. But his authority to appear cannot be legally questioned, until facts or circumstances are shown, by affidavit, or otherwise, sufficient to raise a general presumption that he is not authorized to appear. *id*

3. Where A. sues for the use of B., and the facts are that the attorney appearing for the plaintiff knew nothing of A., nor where he resided, that he appeared for B. by retainer of B., that B. had possession of the instrument sued on, and filed it, that the constable had receipted to C. for it, as received by his hands, of A., and that the receipt was assigned by C. to B., the legal presumption is that B. was the bona fide holder of the in-

- strument, and equitably entitled to its proceeds. *id*
4. And this presumption being in no way impugned, the admission that the attorney was retained by B., shows sufficient legal authority in him to appear. *id*
 5. An attorney at law cannot be made liable as for money collected by him as attorney, unless it be proved either that he failed to prosecute the claims put in his hands for collection, with due and proper diligence, and that thereby the plaintiff lost the debt or claim; or that he has collected the money, and refused to pay it over on demand, or remit it according to instructions. *Cummins v. McLain, et al.*, 402
 6. The attorney's liability depends upon the principle of his agency for the plaintiff, and he holds the money for him in the capacity of agent. *id*
 7. Before, therefore, he can be charged as being guilty of *laches* or culpable negligence, the plaintiff must demand payment, or request the money to be remitted, and the attorney must refuse to pay or remit. *id*
 8. Where an attorney sends a claim to another for collection, and the latter collects the money and refuses to pay it over to the plaintiff except upon the order of the former, the presumption is that the latter was the agent of the former; and this presumption amounts to full and satisfactory proof, unless it is rebutted or explained by competent testimony. *id*
 9. If the latter attorney, in such case, had collected the money and refused to pay it over, the former would be liable, but not without demand on himself, and his own refusal to pay. *id*
 10. To sustain an indebitatus assumpsit count against an attorney, he must actually have the money; unless, from the special facts a legal presumption arises that he has received the money; and it is questionable whether even this exception prevails in case of an attorney. *id*
 11. An attorney is not liable in the discharge of his official duty, for claims put into his hands to collect as such attorney, unless it be shown that he has been guilty of culpable negligence in the prosecution of his suit, and that thereby the plaintiff has lost his debt. *Sevier v. Holiday*, 512
 12. Nor can he be held liable for money collected by him as an attorney, unless a demand be made upon him and he refuses to pay it over, or remit it, according to the instructions of his client. *id*
 13. In an action against an attorney, for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person calling for so many dollars, to bring suit on, recover and collect of a third person, for the use and benefit of the plaintiff, for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict upon it in favor of the plaintiff will not sustain the judgment. *id*
 14. A party having no interest in a note cannot be injured by the failure of an attorney to collect it. If his declaration does not show such an interest, or such an interest is not legally implied from its allegations, he cannot prove his interest—nor does he show any right to recover. *id*

AUDITOR.

1. The Legislature had the power to authorize the Auditor to sue on official bonds executed by the Governor and his successors; and the Auditor had the power on the 29th of January, A. D. 1839, to sue for the use of the State on such a bond. *The Auditor v. Woodruff, et al.*, 73
2. The act of 1836, authorizing the Auditor of Public Accounts "to sue for any demand which the people of the State may have a right to claim," &c., was in force on the 7th of September, 1838, and authorized him to sue, as Auditor, on a Sheriff's bond, given to the Governor and his successors in office. *Taylor, et al. v. The Auditor*, 174
3. But his right, so to sue, depends upon the interest which the State or people have in the debt, or thing demanded, and their right to claim the same; and, therefore, the people's interest in, or right to claim the demand, must appear by some appropriate averment in the pleadings, to enable him to maintain the action. *id*
4. Where, therefore, suit is brought by the Auditor, for the use of the State, and he declares for the penalty of a Sheriff's bond, given to the Governor and his successors in office, a copy of which bond, with the condition, is given and accepted as oyer, and the only material events in the declaration, tending to show his right to sue, are, that he is Auditor; that he sues as Auditor for the use of the State; and that by virtue of the statute an action has accrued to him as Auditor to sue for the penalty of the bond for the use of the State; the declaration shows no legal right in the people of the State to claim the debt demanded. *id*

5. A Sheriff's bond, given to the Governor and his successors in office, does not vest in him or his successors any beneficial interest in such contract. He takes simply the legal interest, and a naked trust.
6. Neither the Governor or Auditor can receive or release the debt, or change or discharge the obligation; nor can the Auditor discharge the legal liability of any person to the State, except in the manner prescribed by law, after payment or satisfaction of the demand has been made to such officer as is authorized to receive it. *id*
7. A suit commenced by the Auditor, when he was authorized by the act of 1836, to bring such suit, and in which judgment obtained by him is reversed, after he is divested of such right to sue, may still proceed to final judgment in his name, after its return to the Circuit Court upon reversal. *id*
8. The Auditor of Public Accounts is not a judicial officer, nor can he exercise judicial power or authority. *The Auditor v. Davies, et al., 494*
9. Whether the issuing of a distress warrant against a Sheriff and his securities by the Auditor is an exercise of judicial power, left undecided. *id*
10. There being no legislative provision, authorizing the Circuit Court of Chicot county to issue a writ of certiorari to the Auditor of Public Accounts, a writ issued to the county of Pulaski is void. *id*
11. All suits against the State must be brought in the Circuit Court of the county in which the seat of government is situate, and be against the State by name; and the process must be a summons executed by delivering a copy to the Auditor. *id*
12. The Auditor is by law to keep his office at the seat of government; consequently he is beyond the reach of the jurisdiction of the Chicot Circuit Court, or any order of the Judge of that Circuit for or against the State. *id*
13. A certiorari to the Auditor, to bring before the Circuit Court the proceedings of the Auditor in issuing a distress warrant, is, to all intents and purposes, a suit against the State. *id*
14. All proceedings on such a writ are, therefore, extra-judicial, and *coram non judice*. *id*

AUTHENTICATION.

1. A deed of trust acknowledged before a Notary Public in Louisiana, and subscribed in the presence of two witnesses,

whose names and attestations were affixed to it; authenticated by the Notary Public, with the certificate of the Governor of Louisiana annexed, showing that the Notary Public was duly commissioned and in office at the time; is not so authenticated as that it can be read in evidence in this State without other proof of its execution. *Wilson v. Royston, 315*

B

BILLIARD TABLES.

1. Keeping a billiard table cannot be made a privilege, under that clause of the Constitution which provides that all property shall be taxed according to its value; but that the Legislature may tax merchants, hawkers, pedlars, and privileges. It is not a *privilege*, and therefore the law imposing a tax of five hundred dollars for every six months on each keeper of a billiard table is unconstitutional and void. *Stevens et al. v. The State, 291*

BILLS OF EXCEPTION.

1. If a party wishes to avail himself of any matter upon error, which does not necessarily appear of record, he must file exceptions at the trial, or request a special verdict. *Lenox v. Pike, 14*
2. Even if the statement of testimony in this case could be considered as a bill of exceptions, still it could not be considered in the Supreme Court, as it does not appear to have been taken during the trial, or upon any motion made in the court below. *id*
3. Bills of exceptions are only allowable during the trial, and that they were then taken must appear on their face. If reduced to form, and signed, after the trial, it must appear that they were taken at the trial. *id*
4. Courts have, uniformly, where justice and circumstances required it, indulged the parties in preparing bills of exceptions. *McDonald v. Faulkner, 472*
5. It is an indulgence often allowed to parties, and sometimes necessary, where great labor is required in the preparation of their cases. Nine days after overruling a motion for a new trial, is not so unreasonable as to create a doubt of the truth of the statements in the bill of exceptions. *id*
6. The cases of *Gray vs. Nations*, and *Lenox vs. Pike and wife*, do not conflict with this doctrine. *id*
7. And when it appears that the exceptions

- were taken at the trial, and on overruling the motion for a new trial, and subsequently reduced to writing and signed and sealed by the court, they become a part of the record. *id*
8. Where the record states that upon the overruling of the motion for a new trial, the defendant excepted, and placed his exceptions upon the record, and the bill of exceptions, signed nine days afterwards, states that the exceptions were taken when the motion for a new trial was overruled, the fact that they were taken at that time cannot be controverted. *id*
9. And where, in such case, the plaintiff had his bill of exceptions signed by the bystanders, objecting to the defendant's bill after such a lapse of time; and in it admits that the instructions and evidence on which the defendant's bill was based, were a part of the proceedings at the trial, he is estopped from denying such instructions and evidence to have been given and adduced on the trial. *id*
10. Reasons assigned by the court for permitting particular evidence to be adduced, not given as instructions, nor addressed to the jury, can have no bearing on the case; nor can they be excepted to. The Court of Errors looks to the admission or rejection of the testimony, and not the reasons assigned for it. *See v. Holiday*, 512
- ### BONDS.
1. It is no objection on demurrer, that a joint bond is declared on as joint and several, for by statute, all joint bonds may be sued in the same manner as if they were joint and several. *The Auditor v. Woodruff et al.*, 73
2. In an action upon a bond, it is not necessary to aver that the bond was delivered. The allegation that it is the bond of the defendant, implies a delivery. *id*
3. A bond given in his capacity of guardian, by a person appointed as such by a court having no power to make the appointment, is void. *Heilman v. Martin*, 158
4. Even if such a bond were valid, it is doubtful whether the ward could sustain an action upon it, to recover the value of work and labor by him done for the guardian. Such a bond imposes no obligation on the guardian to pay the ward for services and labor; which is a matter in no wise connected with his trust, or the due and proper performance of his duties as guardian. *id*
5. And even if the ward would be compelled to resort to his action on such bond, yet, where the bond is merely transcribed by the Clerk, as a part of the record, the existence of such a bond does not appear, so that it could bar an action of assumpsit. *id*
6. Upon administrator's bond, made payable to "the Governor and his successors in office," the right of action is not restricted to the immediate successors of the Governor in whose name such a bond may have been taken. *Phillips et al. v. The Governor*, 332
7. Any remote successor of such Governor may sue on such bond, and state himself to be the successor of such Governor to whom the bond was executed, without noticing the intermediate Governors. *id*
8. And in such case the declaration may state the bond to have been made "to the plaintiff." *id*
9. Under 8th and 9th Wm. III, substantially re-enacted in the Territory of Arkansas in 1831, the plaintiff in actions on penal bonds, was compelled to assign or suggest breaches; and unless the condition and breach both appeared on the record, the proceedings were erroneous. *id*
10. In a bond executed to the Governor, and his successors, by an administrator, &c., the Governor holds the legal interest as a naked trust, and no injury appears to have been sustained by the cestui, for whose use the suit is brought, until a special breach or breaches are assigned. *id*
11. In such suit, therefore, each breach must specially state the facts on which the right of action of those for whose use the suit is brought depends, with as much certainty and precision as is required in the counts of a declaration. *id*
12. If the plaintiff fails to suggest or assign the proper breaches no cause of action is shown to have accrued. *id*
13. A breach is well assigned, if in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import or effect. *id*
14. And where, on such a bond, the breach amounts merely to a general statement that the administrator has done nothing which he was bound to do, it is fatally defective. *id*
15. If a suit on such bond is brought for the use of heirs, they must show by positive and specific averments their interest in the estate; and how, and in what manner, they have been deprived of their interest in the estate by the devastavit of the administrator.
16. Under the Revised Statutes, in suits on penal bonds, the jury must be sworn to inquire into the truth of the breaches, as well as to assess the damages; and the

judgment must be entered for the penalty of the bond, with costs; and the plaintiff have execution for the damages. *id*

See OFFICIAL BONDS.

BONDS FOR COSTS.

1. Upon a motion to dismiss a suit for want of a bond for costs, on the ground of non-residence of the plaintiff at the institution of the suit, no question as to the sufficiency of the security could legitimately arise, until the fact of the plaintiff's non-residence was established, which could only be done by his own admission, or other competent legal testimony. *Smith et al. v. Dudley*, 68
2. And where the fact of the plaintiff's non-residence is nowhere stated in the record, nor stated or recited in the bond for costs, the presumption is that the court below was right in overruling the motion to dismiss. *id*
3. Where it is assigned for error that the court below erred in overruling a motion to dismiss for want of a bond for costs, in order to obtain a reversal the record must establish the non-residence of the plaintiff. If it does not, the presumption is in favor of the decision below. *Clark v. Gibson*, 109
- Davies v. Gibson*, 115
4. No bond for costs is necessary in the Supreme Court. *Dillard v. Noel*, 123

See ABATEMENT, 1, 2, 3, 6, 7.

C

CERTIORARI.

1. A certiorari is sometimes awarded by the court *ex officio*, for their own satisfaction, or to enable them to *affirm*; but never with a view of supplying matter to enable them to *reverse* the judgment, nor is it ever done, unless the diminution appears from an inspection of the transcript itself. *The Auditor v. Woodruff et al.*, 73
2. Under the Constitution and laws of this State, an erroneous decision of the Circuit Court, sitting in chancery, cannot be reached by a writ of error; but may be relieved against by a writ of certiorari, or an appeal regularly taken by the party aggrieved. *Gibson et al. v. Rogers*, 334
3. A certiorari to the Auditor, to bring before the Circuit Court the proceedings of the Auditor in issuing a distress warrant is to all intents and purposes a suit against the State. *The Auditor v. Davies*, 491

CHANCERY.

1. A writ of error only lies to bring up the record and proceedings of an inferior court, when such court proceeds according to the course of the common law. *Gibson et al. v. Rogers*, 334
2. It therefore does not lie to reverse any final decision, order, or decree in chancery, rendered by the court below. *id*
3. Under the Constitution and laws of this State, an erroneous decision of the Circuit Court, sitting in chancery, cannot be reached by a writ of error; but may be relieved against by a writ of certiorari, or an appeal regularly taken by the party aggrieved. *id*

CIRCUIT COURTS.

1. The power and authority of each Circuit Judge in this State are restricted and limited to the prescribed and ascertained boundaries of his circuit. *The Auditor v. Davies et al.*, 494
2. No writ or process, issuing out of any Circuit Court, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues, according to the principles of the common law. *id*
3. Consequently, a Circuit Court of one county cannot run its writ or process into any other county, without some legislative provision on the subject. *id*

See COURTS 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26.

See PRACTICE IN THE CIRCUIT COURT.

CONSTITUTIONAL LAW.

1. The act which gives to the Supreme Court the power to grant writs of injunction to stay waste and proceedings at law throughout the State, is a clear and palpable violation of the Constitution, and therefore null and void. *Jones, ex parte*, 93
2. The office of State Treasurer, as well as those of Secretary of State, Sheriff, Coroner, Constable, and Militia officers, are all Executive. *The State v. Hutt*, 282
3. They belong to the Executive department, for the Constitution assigns them to that division of power, and makes all their duties necessarily of an Executive character. *id*
4. The office of Justice of the Peace is as much a judicial office as the office of Supreme Judge. *id*
5. No person therefore can, at the same time, hold the offices of Treasurer and Justice of the Peace. *id*

6. A person holding one office has a right, if elected to another which he cannot hold at the same time, to accept it, but in so doing he vacates, *eo instanti*, the first office. *id*
7. Where a Justice of the Peace, therefore, was elected and commissioned State Treasurer, and accepted the latter office, he wholly vacated and annulled his office of Justice of the Peace. *id*
8. All property in this State must, by the Constitution, be taxed according to its value; and the tax thereon must be equal and uniform throughout the State. *Stevens et al. v. The State*, 291
9. The Legislature has no power to discriminate, and fix upon one description or species of property a greater tax than that fixed by law upon every other description or species of property of equal value, subjected to taxation. *id*
10. Every individual may lawfully acquire and possess any species or description of property, if he does not thereby destroy or deprive some other person of his property, or some enjoyment thereof, in which he is protected by law. *id*
11. But property, when acquired and possessed, must be so kept and disposed of as not to injure any paramount legal right of another, or affect injuriously the public morals, or public good, so far as they are protected by law. *id*
12. The Legislature cannot restrict any one from making or purchasing a billiard table; but may, by law, so regulate or restrict the use of it, as to prevent any injury therefrom to the public morals or public good. *id*
13. No individual in this government does, or can, have or possess any privilege which is not common to every other citizen of the State, until it is created by law, and acquired by him under authority thereof, and in the manner therein designated. *id*
14. The Legislature can tax no privileges, except those created by law, and legally existing at such time as the law imposing the tax directs it to be levied thereon. *id*
15. The Legislature cannot, by prohibiting the exercise of a right common to every citizen, and then allowing its exercise upon payment of a tax, create it a privilege. *id*
16. The privileges made taxable by the Constitution, are such as cannot be exercised or enjoyed by any citizen or integral part of the community, without the intervention of some statutory provision, granting to, or conferring upon one or more individuals the right of doing some particular thing, as the right of banking, keeping a ferry, &c. *id*
17. It might also embrace such as enjoy any privilege by way of exemption from the performance of onerous duties imposed upon the great mass of the community, if such exemption be first created by statute; but this admits of great doubt. *id*
18. Keeping a billiard table cannot be made a privilege, under that clause of the Constitution which provides that all property shall be taxed according to its value; but that the Legislature may tax merchants, hawkers, pedlars, and privileges. It is not a *privilege*, and therefore the law imposing a tax of five hundred dollars for every six months on each keeper of a billiard table is unconstitutional and void. *id*
19. The right of keeping a stallion is strictly and emphatically a common right, not derived from, or enjoyed by virtue of, any grant from the Government; nor is it enjoyed by part, and denied to others, of the community. Consequently it cannot be metamorphosed into a privilege, subject to taxation as such. *Gibson v. The County of Pulaski*, 309
20. That provision of the statute of Nov. 7, 1836, which provides for levying a tax, for the privilege of keeping a stallion, is unconstitutional. *id*
21. The jurisdiction of Justices of the Peace in matters of contract is expressly defined and limited by the Constitution, and the Legislature has no control over it. *Dillard v. Noel*, 449
22. The jurisdiction of the Circuit Court in matters of contract is not exclusive, and therefore in such matters the Legislature may vest a concurrent jurisdiction in other tribunals; but cannot divest the Circuit Courts of such jurisdiction, or restrict or prohibit its exercise, so far as depends on the sum in controversy. *id*
23. The jurisdiction of the Circuit Courts, and of Justices of the Peace, in matters of contract, is to be determined solely by the sum in controversy; and when a defendant voluntarily enters his appearance, or is found, or legally served with due process or notice, the jurisdiction is acquired without regard to the residence of either of the parties. *id*
24. So much of the 4th section of chapter 116 of the Revised Statutes, as confines the bringing of suits in the Circuit Court, in cases where the defendant resides in the State, to the county where the defendant resides, or where the plaintiff resides and the defendant is found, is unconstitutional and void; and no averment in the declaration as to the residence of either party, is necessary for any purpose whatever. *id*

CONTINUANCE.

1. Where, at Dec. Term, 1838, a cause was continued on account of absence of A. and B., two of defendant's witnesses, and at May Term, 1839, another affidavit for continuance is filed by him on account of the absence of A., one of the same witnesses, a continuance cannot be granted, because no suit can be twice continued for the same cause. *Burris v. Wise et al.*, 33
2. Every affidavit for a continuance must state that the party has reason to believe that he can procure the attendance of the witnesses by the next term of the court, or that their testimony can be procured by that time. *id*
3. In an affidavit for continuance, under our statute, it is sufficient to state, that the party expects to prove by the witnesses who are absent, the facts stated in the affidavit. *id*
4. The party who, in applying for continuance, seeks to free himself from the presumption of culpable negligence, is bound to show such a state of facts or circumstances, as will prove that he has used due diligence to obtain the testimony, or as will take his case out of the legal inference which stands against him. *id*
5. Where the affidavit states that the defendant had leave to take depositions at the last term of the court, but could not avail himself of that leave, in consequence of the witness having left his former place of abode, at the time when defendant intended to have procured his deposition, to a remote part of an adjoining county, which location the defendant was not apprized of until within the last two or three weeks, when it would have been impossible for him to have procured his deposition in time to be read, and the record shows that he did not apply to take the deposition until two or three weeks prior to the trial, the court acts rightly in refusing a continuance. *id*
6. In failing to apply to take the deposition before, the defendant must be considered guilty of culpable negligence, as he shows no excuse for such failure; and should also have shown that he had diligently searched for and inquired after the residence of the witness, and could not possibly find out where he resided, nor could he, by any practicable means in his power, procure his testimony. *id*
8. Should the Circuit Court, in the exercise of their discretion as to granting or refusing continuances, capriciously or arbitrarily sport away important rights belonging to either party, their decisions

and judgments would be examined in the Supreme Court, and be liable to be corrected on appeal or writ of error. *id*

8. But this court would not reverse a decision or judgment below, for merely granting or refusing a continuance, unless it clearly and positively appears, from the face of the record, that the court below was guilty of palpable and manifest violation of public duty, seriously prejudicing the rights of the party complaining, *id*

COSTS.

See BOND FOR COSTS.

COURTS.

1. The Court of Probate, in each county of this State, under the Constitution, and the act of 1836, consists of a single Judge, and has a general jurisdiction over the appointment of guardians, which is not by any law given concurrently to the County Court: and the latter court possesses no power to appoint a guardian. *Heilman v. Martin*, 158
2. Where the caption of the record of such an order of appointment shows that two Justices of the Peace sat as members of the court making the appointment, together with the Probate Judge, they must be considered as having participated in the appointment, although the record is signed by the presiding Judge alone; and such order will be taken to have been made, not by the Probate, but the County Court. *id*
3. The records of a court composed of several members, or having by law one presiding officer, are not usually signed by every member of the court: and when any member of the court is once shown by the record to have taken his place upon the judicial seat, upon any particular day of a term, his presence and participation in all the business transacted in court during that day, must be presumed until the contrary is proven. *id*
4. All courts, unless restrained by some statutory provision, have a right of adjourning their sittings to a distant day; and the proceedings had at the adjourned session will be considered as the proceedings of the term so adjourned. *Dunn v. The State*, 229
5. The Circuit Courts, in this State, as contra-distinguished from the Judges, have, unalterably, by the Constitution, the exclusive original judicial cognizance

- of all crimes amounting to felony at the common law. *id*
6. No judicial power whatever is conferred by the Constitution upon the Judge, as contra-distinguished from the court, unless he can derive it from the power with which he is clothed as a conservator of the peace, or of adjudicating certain cases upon habeas corpus. *id*
 7. To constitute a court there must be a place appointed, by law, for the administration of justice; and some person, authorized by law to administer justice at that place, must be there for that purpose. *id*
 8. And if the law prescribed no time for holding the court, the Judge might lawfully hold it when, and as often as he chose. So if the place were left to his election, instead of being fixed and prescribed by law, he might lawfully sit in judgment where he pleased, within the Territorial limits prescribed to his jurisdiction. *id*
 9. But in this State, both the time and place of holding the terms of the Circuit Court in each county are prescribed by law; and in many counties the duration of the terms limited to a single week. *id*
 10. Under particular circumstances, a special term of any Circuit Court may be held for the trial of persons confined in jail, upon the Judge making out a written order to that effect, and transmitting it to the clerk, who is to enter it on the records of the court, and notify the Prosecuting Attorney. *id*
 11. The authority to hold such special term depends upon the following facts and circumstances:—*First*. That some person is confined in jail, who may be lawfully tried upon some criminal charge. *Second*. That it shall not interfere with any other court to be held by the same Judge. *Third*. That it shall not be held within twenty days of the regular term of such court. *Fourth*. That an order therefor be made out by the Judge, and by him transmitted to the Clerk. *Fifth*. That the same be entered on the records of the court. *id*
 12. And the power to hold a special term, being a special power, every circumstance necessary to its exercise must exist, and be made to appear of record; otherwise the power cannot appear to have been legally exercised. *id*
 13. The power of the court, at such special term, is confined to the trial of the persons confined in jail when the order was made, which must be at least ten days before the term: and no other persons can be tried at such term. *id*
 14. The order for a special term must, therefore, be made at least ten days before the commencement of the term, must designate the persons to be tried, state that they are confined in jail, and whether they have been indicted or not; and if they, or either of them, have not been indicted, must contain a direction to the Clerk to issue a *wenire* for a grand jury; and such order must be transmitted to the Clerk, and by him entered on the record of the court. *id*
 15. When this is done, if the time fixed in the order for the special term interfere with no other court to be held by the same Judge, and is not within twenty days of the regular term; and if then the record further shows that the Judge authorized by law to hold such court, was present at the time fixed in the order, and at the place prescribed by law for holding such court, the court will be legally constituted; and in regard to such persons as are confined in jail and designated in the order, may exercise judicial power. *id*
 16. And where a special term is held, without any such order being entered upon the record, the proceedings at such term must be considered as proceedings before the Judge, simply, as contra-distinguished from the court; and cannot be regarded as the judicial proceedings and adjudications of the Circuit Court. *id*
 17. Such proceedings, therefore, are *coram non judice* and void; and the life of the person so convicted cannot be considered as having been, in contemplation of law, once put in jeopardy; and he may yet be lawfully tried as if no such proceeding had ever taken place. *id*
 18. The appellate jurisdiction of the Supreme Court of this State, under the Constitution does not, nor can it be made to, extend to the proceedings or decision of any officer or tribunal whatever, other than the *judicial* proceedings or determination of some court or Justice of the Peace, vested under the Constitution with some portion of judicial power. *id*
 19. And the proceedings at the special term being *coram non judice*, the Supreme Court has no appellate jurisdiction of the case; and it will be dismissed; and a perpetual supersedeas awarded to stay all proceedings had at the term in the case. *id*

See CIRCUIT COURTS.

PROBATE COURTS.

See COURTS, 1, 2, 3.

COVENANT.

1. In declaring upon a covenant, it is not necessary to set out the exact words of the agreement, but only to state its legal effect, according to its true meaning and intention. *Roydon v. Sumner*, 465
2. Whenever a covenant is in its terms defective, it ought to be set out according to its legal consequences. *id*
3. Where a client covenanted with an attorney that he would pay him a certain sum in case he (the client, should gain a certain suit, in which he had employed the attorney, the declaration on the covenant properly stated the covenant to be that the client would pay that sum in case the attorney gained the suit; and an averment that the attorney did gain the suit for his client, is a sufficient averment of the condition precedent to the covenant. *id*
4. An assignment of a covenant, under the Territorial Law, passed no legal interest in the covenant, to the assignee, so as to enable him to sue on it in his own name: but it unquestionably passed the equity. *Sabin v. Hamilton*. 485
5. No precise or technical words are necessary to constitute a covenant, but any words which show the intention of the parties will be sufficient for that purpose. *id*
6. The inquiry always is, what were the intentions of the parties? And if there be any ambiguity, such construction is always given as will make most strongly against the covenantor. *id*
7. Where a party to a covenant by which he was bound to do certain acts, upon the performance of which the other party was to become indebted to him in a certain sum, endorses upon it under his seal, that he certifies that the agreement has been complied with on his part, and that the other party is therefore indebted to him as provided in the covenant, all of which, in consideration of a certain sum to him in hand paid by a third person, he assigns to such third person; and adds, that the other party to the covenant "will, on sight, pay to such third person" the amount according to contract: such endorsement is a covenant. *id*
8. And in it are contained three distinct and separate covenants: first, that the covenantor had performed his part of the original covenant; second, that the other party to the original covenant was indebted to him in the amount specified; and third, that said party would pay it on sight. *id*
9. And in a declaration upon such covenant, the breach is not sufficient where

it is, merely, that the covenant sued on was presented to the other party to the original covenant, and that he refused to pay according to its true meaning and effect. *id*

CRIMINAL LAW.

See EVIDENCE, 10, 11, 12, 13, 14, 15, 16, 17, 18.

D

DAMAGES.

1. In estimating the damages arising from the breach of contract, in failing to deliver goods according to agreement, the difference between the price agreed on, and the marketable price of the same property, at the time fixed upon for the delivery must govern the jury. *Hanns v. Harter*. 397

DEED.

See EVIDENCE, 20, 21, 22, 23, 24, 25.

DEMURRER.

See PRACTICE, 15 to 22.
PLEAS AND PLEADINGS, 9, 10, 27, 28, 29.
PRACTICE IN ERROR, 19, 30.

DEPOSITIONS.

See EVIDENCE, 17, 18.

DETINUE.

1. A verdict in detinue, finding the slaves in the declaration mentioned, to be the property of the plaintiff, affixing their values severally and respectively, finding their detention by the defendant, and awarding a certain amount of damages for the detention, is valid. *Lenox v. Pike et al.*, 14

DISTRESS WARRANT.

1. The Auditor of Public Accounts is not

a judicial officer, nor can he exercise judicial power or authority. *The Auditor v. Davies et al.*, 494

2. Whether the issuing of a distress warrant against a Sheriff and his securities by the Auditor is an exercise of judicial power, left undecided. *id*

E

EQUITY.

See CHANCERY.

EVIDENCE.

1. Where, to the transcript of the record sent up to the Supreme Court a paper is found appended, purporting to be a statement of the testimony given in the case, detailing the evidence, signed by the Judge below, and marked filed by the clerk, it is no part of the record, and cannot be regarded in the Supreme Court. *Lenox v. Pike*, 14
2. Whatever proceedings or facts the law or the practice of the courts requires to be enrolled, constitute and form a part of the record—such as all judicial writs and process, the finding of a jury, the judgment of the court, and the like. *id*
3. Whatever is not necessary to be enrolled, such as oral and written testimony, exceptions, &c., constitute no part of the record, unless they are expressly made so by order of the court, by agreement of parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict. *id*
4. Although the evidence spread on the record is not sufficient, when taken by itself, to sustain the judgment, yet if the record does not state that no other testimony was adduced, it will be presumed that there was other testimony sufficient to sustain the verdict and judgment. *Ballard v. Noaks*, 45
5. Where a record is first shown, by proper evidence, to be lost or destroyed, it is competent to prove its existence by a sworn or authenticated copy. *Smith v. Dudley*, 60
6. But to warrant such evidence, the document must be *vetustate temporis aut judicaria cognitioe roborata*. *id*
7. But in all the cases on this subject, the question arose incidentally on the trial, and in no instance did the lost record it-

self constitute the sole foundation or cause of the proceedings. *id*

8. Without some legislative provision, this court would be exceedingly unwilling to declare, that a lost judicial record, which constituted the sole foundation or cause of action, could be proved or verified merely by *parol*. *id*
9. Such a proposition can derive no support or countenance from the principles of the common law, and there is no statutory regulation in regard to the matter. *id*
10. Testimony of a person's guilt, or participation in the commission of a crime, or felony, wholly unconnected with that for which he is put upon his trial, cannot, as a general rule, be admitted. *Dunn v. The State*, 229
11. But where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt, in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime. *id*
12. But proof of a distinct murder, committed by the prisoner at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time, in which the prisoner participated, cannot be admitted, until proof has been given, establishing, or tending to establish the offence with which he is charged, and showing some connection between the different transactions; or such facts and circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by some circumstances connected with the former; in which case, such circumstances connected with the former, as are calculated to show the *quo animo* or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction, are competent and legitimate testimony. *id*
13. The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, is, that they were made at a time when, in the mind of the deceased, all expectation of recovery was yielded up, and supplanted by the conviction that he would certainly die by reason of the injury received, and under which he then languished. *id*
14. When every hope of this world is gone:

- when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. *id*
15. That such declarations were made under an apprehension of impending death, may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension. *id*
16. Nor is it essential that the party should apprehend *immediate* dissolution. It is sufficient if he apprehends it to be impending and certain; and this is always a question for the court to determine, upon consideration of all the surrounding circumstances. *id*
17. The deposition of a witness, concerning a killing, taken under the statute before the Coroner, reduced to writing, subscribed by the person examined, and attested by the Coroner, and by him returned to the Circuit Court with the inquest, is a written document, which, by authority of law, is constituted the authentic and appropriate instrument of evidence, of what the witness then stated; and the deposition itself being in existence and attainable, being in court, in the hands of the Attorney of the State, oral evidence of the contents thereof could not legally be admitted on the part of the prosecution in a trial of such witness for the murder. *id*
18. Moreover, by the statute, the evidence so taken before the Coroner, cannot be used against the person giving it, in a subsequent prosecution for the same killing: and therefore, neither the deposition of the defendant in this case, taken before the Coroner, nor oral testimony of its contents, could be used against him. *id*
19. A deed of trust acknowledged before a Notary Public in Louisiana, and subscribed in the presence of two witnesses, whose names and attestations were affixed to it; authenticated by the Notary Public, with the certificate of the Governor of Louisiana annexed, showing that the Notary Public was duly commissioned and in office at the time; is not so authenticated as that it can be read in evidence in this State without other proof of its execution. *id*
20. To prove the execution of a deed, the testimony of the subscribing witnesses cannot be dispensed with, unless it be first shown that they are dead or interested, or have become infamous; or that their names are fictitious; or unless a most diligent search be made for them, and they cannot be found or heard of; or they are out of reach of the process of the court. *id*
21. When these facts are proved, the next best evidence is by proving the handwriting of attesting witnesses. *id*
22. And if the handwriting of the witnesses cannot be proved, after proper diligence for that purpose, then the handwriting of the obligor may be proved, but not before. *id*
23. The handwriting of the subscribing witnesses must be proved, even where they have become incompetent since their attestation. *id*
24. Therefore, where the whole showing is, that the witnesses sworn in the trial, stated "that they had no knowledge of the subscribing witnesses to the deed; and that they had never known of their residing in this State;" this showing does not warrant the admission of the deed by proof of the hand writing of the obligor. *id*
25. To sustain an action on special contract, the proof must correspond substantially with the agreement, as laid in the declaration. *Hanna v. Harter*, 397
26. In action on the case, a recovery, release or satisfaction need not be pleaded, but may be given in evidence under the general issue. Whatever will in equity and conscience preclude the plaintiff's right of recovery, may be given in evidence. *Jones v. Buzzard, et al.*, 415
27. Where, in case for negligence, one count in the declaration recites a writ of attachment, by virtue of which, it is alleged, certain property was seized, and afterwards lost by negligence of the sheriff and plaintiffs in attachment, the defendants have a right to read the original writ in evidence to the jury. *id*
28. To entitle a party to a credit under the plea of non assumpsit, he must prove: *first*, a payment in money, or its equivalent; *second*, that it was accepted; and, *third*, its application to the particular debt. *McDonald v. Faulkner*, 472
29. Payment can, in numerous instances, be given in evidence under the plea of non-assumpsit. The plaintiff can recover no more than he is justly entitled to, in equity and conscience, which is no more than what remains after deducting all just allowances which the defendant has a right to retain in his hands. *id*
30. Where the defendant's account, including money payments and other charges, was presented to the plaintiff, who examined it, made some corrections, and then assented to its correctness, and agreed that it should be taken and considered as

- a credit and payment against and upon his own account, this is such a payment as can be given in evidence under the plea of non-assumpsit. *id*
31. Very slight evidence of acquiescence will show assent to any particular mode of payment. *id*
32. In proceedings under the attachment law, the answer of a garnishee is *prima facie* evidence of the truth of the allegations it contains. *Mason v. McCampbell*, 506
33. But these allegations may be rebutted or disproved by any other competent evidence. *id*
34. And where it is assigned for error that the court below refused to instruct the jury that the answer of the garnishee under oath should be taken as true until disproved by the plaintiff, the bill of exceptions should set out all the evidence in the case, or show that there was no other evidence. *id*
35. If this is not done, the legal presumption is that the court below refused to give the instruction, because the answer was disproved or rebutted. *id*
36. In an action against an attorney, for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person calling for so many dollars, to bring suit on, recover and collect of a third person, for the use and benefit of the plaintiff, for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict upon it in favor of the plaintiff will not sustain the judgment. *Sevier v. Holiday*, 512
37. And under such a count, a receipt given by the defendant stating that he had received of the plaintiff a note of so many dollars, against A. B. in favor of C. D., so far from proving the title to the note to be in the plaintiff, proves it to be in C. D., who is the legal owner, and is held in law to have possession of it. Such a receipt is, therefore, inadmissible as evidence under such a count. *id*
38. Such a count shows a defective title, and not a title defectively stated; and no proof is admissible under such a count, which can make it good. *id*
39. Reasons assigned by the court for permitting particular evidence to be adduced, not given as instructions, nor addressed to the jury, can have no bearing on the case; nor can they be excepted to. The Court of Errors looks to the admission or rejection of the testimony, and not the reasons assigned for it. *id*
40. A party cannot be allowed to prove more than he has alleged in his declaration; and when he omits to allege a fact essential to his action, and not involved or implied in the pleadings, or inferable from the verdict, he can offer no proof of such a fact. *id*
41. A party having no interest in a note cannot be injured by the failure of an attorney to collect it. If his declaration does not show such an interest, or such an interest is not legally implied from its allegations, he cannot prove his interest—nor does he show any right to recover. *id*
42. To entitle a plaintiff to recover in trover, two things are necessary to be stated and proven. *First*, property, either general or special in the plaintiff; and *second*, a wrongful conversion. *id*

EXECUTORS & ADMINISTRATORS.

1. When a party sues, as executor, &c., there must be a substantial averment in the pleadings, showing that he sues in his representative capacity, and nothing by intentment can be taken to supply the want of such an allegation. *Sabin v. Hamilton*, 584
2. But it is immaterial in what part of the declaration or pleadings such averment occurs. And therefore, where, in the breach, the declaration alleges that the defendant "has not paid to the intestate in his lifetime, nor to the plaintiff *as administrator aforesaid*," this is sufficient. *id*

EXTINGUISHMENT.

1. Where the plaintiff and defendant had rented a house by parol agreement as co-tenants, and after the rent had become due, the defendant executed to the landlord his individual bond for the whole rent, the execution and delivery of the bond operated by law as an extinguishment of the *joint* liability of the plaintiff and defendant, and the plaintiff was forever discharged from all liability on his parol contract. *Howell v. Webb*, 260

F

FRANCHISES.

See PRIVILEGES.

G

GARNISHMENT.

1. In a suit commenced by a writ of garnishment under the Territorial statute, the plaintiff had the right to deny the truth of the answer, and to empanel a jury to try the issue so made up. *Walker v. Bradley*, 578
2. Consequently an action of garnishment does not go off, like an injunction, on the coming in of answer; nor can the defendant move to dismiss on its coming in. *id*
3. If the answer of the garnishee disclose funds and available means placed in his hands by one of the judgment debtors, for the purpose of paying off the same debt, it is sufficient to charge the garnishee. *id*
4. A levy upon the property of one defendant cannot be set up as a defence in an action of garnishment against the debtor of the co-defendant. *id*
5. The reception by the officer holding the execution, of bank notes, &c., to the full amount of the execution, from one defendant, is no defence to a person garnisheed as debtor of a co-defendant, unless the plaintiff authorized the receipt of such funds, or accepted them after they were received; because, otherwise, it was no actual satisfaction. *id*
6. The garnishee, upon answering, might produce in court the goods, moneys, credits and effects in his hands, and claim to be discharged with costs. *id*
7. If he failed in this, and the court ordered him to proceed and collect the notes, accounts, receipts, &c., in his hands, and he made no objection to such order, he could be subsequently ruled to account; and if such rule being made he rendered no account, nor discharged himself from liability by showing that he could not collect the debts in his hands, the court was right in decreeing against him for the whole amount of evidences of debt before then admitted to be in his hands. *id*

GUARDIAN AND WARD.

1. Even where the relation of guardian and ward existed at common law, the ward might maintain an action of account against his guardian after he came of age; and might, while under age, call him to account by bill in chancery. *Heilman v. Martin*, 158
2. The personal disability of a ward to sue his guardian is matter in abatement only;

and therefore, under the general issue, in an action of assumpsit for work and labor done, by ward against guardian, evidence proving the relation of guardian and ward to exist, is not admissible. *id*

3. A bond given in his capacity of guardian, by a person appointed as such by a court having no power to make the appointment, is void. *id*
4. Even if such a bond were valid, it is doubtful whether the ward could sustain an action upon it, to recover the value of work and labor by him done for the guardian. Such a bond imposes no obligation on the guardian to pay the ward for services and labor; which is a matter in no wise connected with his trust, or the due and proper performance of his duties as guardian. *id*
5. And even if the ward would be compelled to resort to his action on such bond, yet, where the bond is merely transcribed by the Clerk, as a part of the record, the existence of such a bond does not appear, so that it could bar an action of assumpsit. *id*

I

INJUNCTION.

See JURISDICTION, 8 to 20.

INSTRUCTIONS.

1. A court is not bound to instruct the jury as to the law arising upon any abstract principle which may be presented. *Robins v. Fowler*, 133
2. Where the plaintiff and defendant had rented a house by parol agreement as co-tenants, and after the rent had become due, the defendant executed to the landlord his individual bond for the whole rent, the execution and delivery of the bond operated by law as an extinguishment of the joint liability of the plaintiff and defendant, and the plaintiff was forever discharged from all liability on his parol contract. *Howell v. Webb*, 360
3. Papers copied into the transcript, purporting to be instructions asked for, and given or refused, marked on the margin with the word "given" or "refused," opposite each instruction, are no part of the record. *Jones v. Buzzard*, 415
4. And where a party moves for a new trial because the verdict was contrary to law; and because, second, certain instructions were refused; but does not except to the

opinion of the court overruling his motion for a new trial, he is equally as far from making the instructions a part of the record. *id*

boundaries of his circuit. *The Auditor v. Davies et al.*, 494

JUDGMENTS.

1. Where the judgment was for "the debt in the declaration mentioned, to wit, \$2,478 74 cts debt, and \$780 77 damages, to bear interest at 8 per cent. until paid; and also \$491 16 cts. debt, and \$103 11 cts. damages, to bear interest at 6 per cent. until paid, together with costs," the judgment was irregular and illegal. *Wooster v. Clarke*, 101
2. The act of November 3, 1836, makes it the duty of the court to adjudge interest at any rate specified in the instrument sued on, not exceeding 10 per cent., and to ascertain the rate of interest to be recovered, and the time from which and until which the same shall be computed and recovered, and express the same in the judgment. *id*
3. But in this case it is uncertain on what sum or sums the interest is to be computed. A grammatical construction of the judgment would make it computable on the damages only, which would be wholly illegal; and if on debt and damages both, it is equally illegal. *id*
4. Even if computable on the debt alone, still the judgment is uncertain, irregular, and for too much; because, the interest, which is computed to the date of the judgment, and adjudged as damages, would, by virtue of the statute, bear interest from the date of judgment at 6 per cent. per annum, which would be also illegal. *id*
5. In a suit by the State Bank on a note or bond executed to that institution, it is unnecessary to aver that by the non-payment of the note or bond the defendants became liable to pay interest at the rate of ten per centum per annum; or to negative in the breach the payment of such interest. *Bank of State v. Clark*, 375
6. The court is bound judicially to know what the legal interest is, and to give judgment accordingly. *id*
1. Where the record of the court below states that judgment had been rendered at a previous term in favor of the plaintiff against defendant, for a certain amount, and that the records of said judgment had been lost or destroyed: and then proceeds thus: "It is therefore considered by the court, that the plaintiff have leave to re-instate his judgment on the record of this court, and that he have execution thereon for his debt, interest, and costs of suit;" this, though an informal, is clearly a final judgment. *Smith v. Dudley*, 60
2. It clearly concludes the matter of dispute between the parties, and the order for execution is a final decision. That being the case, a writ of error will lie to reach it. *id*
3. Where a writ of summons issued from a Justice, returnable on the 16th of June, 1833, and the Justice rendered judgment by default, against the defendant, on the 17th of June, and the record does not show that the defendant appeared on the 16th, or that the case was continued, the judgment is illegal and void. *Woolford v. Harrington*, 85
4. A court cannot reinstate upon the record a judgment, the original of which has been lost or destroyed. *Webb v. Hanger et al.*, 124
5. No valid judgment can be pronounced against any party, unless he first have notice, either actual or constructive, of the proceeding against him. *Clark v. Grayson*, 149
6. Under the Revised Statutes, in suits on penal bonds, the jury must be sworn to inquire into the truth of the breaches, as well as to assess the damages: and the judgment must be entered for the penalty of the bond, with costs; and the plaintiff have execution for the damages. *Phillips v. The Governor*, 383

See INTEREST, 1, 2, 3, 4.

JURISDICTION, 1, 2, 3, 4, 5, 6, 7.

J

JUDGES.

1. The power and authority of each Circuit Judge in this State are restricted and limited to the prescribed and ascertained

JURISDICTION.

1. Every judgment or judicial proceeding, to be obligatory, must unquestionably show such a state of case as will give jurisdiction to the court that made

- the record, and conclusively prove that the party recovering had good cause of action. *Smith v. Dudley*, 60.
2. Should the record wholly fail to establish these facts, the defect is fatal, and cannot be amended in any stage of the proceedings. *id*
 3. Unless the jurisdiction be shown, and the cause of action proved, no legal presumption can attach in favor of the judgment below. *id*
 4. The moment the jurisdiction is properly shown, and a good cause of action well laid and proved, the judgment or other judicial proceeding draws to itself all the legal presumptions in its favor, which of course stands until it is overthrown by other affirmative matter in the record. *id*
 5. There is no rule of law or practice, that will authorize a court to re-instate upon the rolls or record of its proceedings a final judgment which had been previously given, and enrolled at a former term of the same court, and which subsequently has been lost or destroyed. *id*
 6. Moreover, these proceedings are not only invalid, but absolutely void, because the record does not show that the defendant had any notice of the motion to re-instate the judgment. *id*
 7. It is a principle of natural justice, as well as legal right, that no one can be bound by any judicial proceeding to which he is not a party; and he cannot be made a party unless an opportunity has been offered him of defending himself. *id*
 8. The writ of injunction is a judicial writ. *Jones, ex parte*, 93
 9. The Supreme Court possesses no constitutional power and authority to issue any other writs than those expressly enumerated in that clause of the Constitution which provides that "the Supreme Court shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto, and other remedial writs, and to hear and determine the same;" or such as are necessarily implied in that enumeration. *id*
 10. This clause limits the Supreme Court, in the exercise of *original* jurisdiction, to cases to which the writs therein specially enumerated would apply; and the power to issue "other remedial writs," embraces only such other writs as may be properly used in the exercise of appellate powers, or the power of control over inferior or other courts, expressly granted by the Constitution. *id*
 11. The power to issue writs of injunction to stay proceedings at law, is not conferred upon the Supreme Court, by the expression "other remedial writs," used in this clause of the Constitution. *id*
 12. The Supreme Court can issue no writ which it cannot also hear and determine; and, therefore, it can issue no writ of injunction. *in*
 13. Nor can the Supreme Court derive any authority by implication to issue a writ of injunction from the provisions in the Constitution, that "it shall have a general supervising control over all inferior and other courts of law and equity." *id*
 14. The object of this provision was to prevent a conflict of jurisdiction among the several judicial tribunals which might otherwise arise and endanger the entire plan and form of the government. *id*
 15. The Supreme Court, possessing the attributes of supremacy, must and does possess the power to govern, and to enforce its own authority and decrees: and if the writs enumerated in the Constitution, are not sufficient for that purpose, it may frame new ones, to cause its mandates to be respected and obeyed. *id*
 16. When the Supreme Court has once prescribed the rule of action on any given question, the rule itself, being sovereign and supreme, must be implicitly followed and obeyed by all the inferior judicial tribunals. To disobey or question its authority would be to commit a clear and palpable violation of Constitutional duty. *id*
 17. But before the Supreme Court can lay down any governing rule of action for the inferior, and other courts of law and equity, they must either have acted, or positively refused to act. The Supreme Court cannot act in advance of other tribunals. *id*
 18. The Circuit Courts have the whole original chancery jurisdiction in the State. Issuing a writ of injunction is a proceeding in chancery, and the Supreme Court can issue no such writ, without assuming and exercising a portion of the chancery jurisdiction allotted to the Circuit Courts. *id*
 19. Where jurisdiction is given to the Supreme Court, the practice may be regulated and prescribed by the Legislature; but the Constitutional existence, organization, and jurisdiction of that court can, in no essential point or manner, be changed or altered by the Legislature. *id*
 20. The act which gives to the Supreme Court the power to grant writs of injunction to stay waste and proceedings at law throughout the State, is a clear and palpable violation of the Constitution, and therefore null and void. *id*

21. Unless it appears affirmatively upon the record that the defendant was regularly brought into court, in accordance with the statutory provisions regulating the mode of bringing actions; or that he consented to proceed without process or notice, the court can exercise no jurisdiction over the subject matter. *Webb v. Hanger, et al.*, 124
22. This objection is valid at every stage of the cause, and cannot be cured by any subsequent proceeding. *id*
23. Where the record states, in the judgment rendered, that "it appears to the satisfaction of the court that the defendant has had due notice of his motion" for judgment; the record does not show any legal notice, either actual or constructive, of the proceedings against him. *id*
24. No valid judgment can be pronounced against any party, unless he first have notice, either actual or constructive, of the proceeding against him. *Clark v. Grayson*, 149
25. All pleas to the jurisdiction of a superior court, must show, not only such facts as take the case out of the jurisdiction; but also that there is some other court in which effectual justice may be administered; for if there is no other place or mode of trial, that alone will give the Superior Court jurisdiction. *Heilman v. Martin*, 158
26. The Constitution giving to the Circuit Courts original jurisdiction in all matters of contract where the sum in controversy is over one hundred dollars; in an action of assumpsit, the *verdict* does not furnish the true rule by which the sum in controversy is to be ascertained. *id*
27. It may determine the controversy, or ascertain the respective rights of the parties in the subject matter of the controversy; but cannot indicate or decide what was originally in controversy between them; unless that matter be directly put in issue by a plea to the jurisdiction, setting forth such facts as exclude the court from exercising jurisdiction. *id*
28. This is only necessary in cases where the plaintiff sets forth such facts as present a case within the jurisdiction of the court, although the true and real matter of controversy is not within its jurisdiction. *id*
29. And in such case, if no sufficient plea to the jurisdiction be interposed, the Circuit Court has a legal right to adjudicate the matter, and pronounce final judgment, although the verdict may be for a less sum than one hundred dollars, or in favor of the defendant. *id*
30. The true rule on this subject is, that in all actions, except covenant, where the law limits and specially prescribes the precise sum which may be recovered, upon the cause of action, set out in the plaintiff's declaration, and such cause of action as therein stated, presents a liability or demand exceeding one hundred dollars, exclusive of interest, which, if admitted or proven, the plaintiff is legally entitled to recover, the Circuit Court has jurisdiction, and may pronounce final judgment, if no sufficient plea to the jurisdiction be interposed. *id*
31. But if such plea be put in, and it appears on the trial thereof, that so much of the plaintiff's demand, as reduces it to a sum not over one hundred dollars, is altogether unfounded and fictitious, or has been paid, or otherwise legally discharged or satisfied, so that the real sum in controversy does not exceed one hundred dollars, the suit must abate for want of jurisdiction. *id*
32. This rule applies to all actions upon liquidated demands, actions of indebtedness assumpsit, and all other actions, where the law limits and specially prescribes the sum which may be legally claimed and recovered upon the contract as set out or presented by the plaintiff, and no discretion is left with the court or jury as to the amount to be recovered, if the contract be admitted or proved as stated. *id*
33. But where the law does not limit and specially define what sum shall be recovered upon the contract as stated, but leaves it in the discretion of the court or jury to determine what the plaintiff ought to have for the non-performance of the contract as set out, or presented by the plaintiff, as in assumpsit for breach of contract to marry, and the like, in which the damages, or sum which may be recovered, are unliquidated and uncertain, the damages claimed in the declaration constitute the sum in controversy and determine the jurisdiction. *id*
34. The Circuit Courts, in this State, as contra-distinguished from the Judges, have, unalterably, by the Constitution, the exclusive original judicial cognizance of all crimes amounting to felony at the common law. *Dunn v. The State*, 229
35. The appellate jurisdiction of the Supreme Court of this State, under the Constitution does not, nor can it be made to, extend to the proceedings or decision of any officer or tribunal whatever, other than the judicial proceedings or determination of some court or Justice of the Peace, vested under the Constitution with some portion of judicial power. *id*

36. When such a contract is alleged in the declaration, as, if proved or admitted, would justify the recovery of a sum exceeding one hundred dollars, the jurisdiction of the Circuit Court, in such case, can only be questioned by a plea in abatement. *Hanna v. Harter*, 392.
37. The jurisdiction of Justices of the Peace in matters of contract is expressly defined and limited by the Constitution, and the Legislature has no control over it. *Dillard v. Noel*, 419.
38. The jurisdiction of the Circuit Court in matters of contract is not exclusive, and therefore in such matters the Legislature may vest a concurrent jurisdiction in other tribunals; but cannot divest the Circuit Courts of such jurisdiction, or restrict or prohibit its exercise, so far as depends on the sum in controversy. *id*.
39. The jurisdiction of the Circuit Courts, and of Justices of the Peace, in matters of contract, is to be determined solely by the sum in controversy; and when a defendant voluntarily enters his appearance, or is found, or legally served with due process or notice, the jurisdiction is acquired without regard to the residence of either of the parties. *id*.
40. So much of the 4th section of chapter 116 of the Revised Statutes, as confines the bringing of suits in the Circuit Court in cases where the defendant resides in the State, to the county where the defendant resides, or where the plaintiff resides and the defendant is found, is unconstitutional and void; and no averment in the declaration as to the residence of either party, is necessary for any purpose whatever. *id*.
41. The power and authority of each Circuit Judge in this State are restricted and limited to the prescribed and ascertained boundaries of his circuit. *The Auditor v. Davies et al.*, 194.
42. No writ or process, issuing out of any Circuit Court, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues, according to the principles of the common law. *id*.
43. Consequently, a Circuit Court of one county cannot run its writ or process into any other county, without some legislative provision on the subject. *id*.
44. There being no legislative provision, authorizing the Circuit Court of Chicot county to issue a writ of certiorari to the Auditor of Public Accounts, a writ issued to the county of Pulaski is void. *id*.
45. A sovereign state or government cannot be sued without some legislative provision authorizing such proceeding; and the statute must be strictly followed. *id*.
46. All suits against the State must be brought in the Circuit Court of the county in which the seat of government is situate, and be against the State by name; and the process must be a summons executed by delivering a copy to the Auditor. *id*.
47. The Auditor is by law to keep his office at the seat of government; consequently he is beyond the reach of the jurisdiction of the Chicot Circuit Court, or any order of the Judge of that Circuit for or against the State. *id*.
48. A certiorari to the Auditor, to bring before the Circuit Court the proceedings of the Auditor in issuing a distress warrant, is, to all intents and purposes, a suit against the State. *id*.
49. All proceedings on such a writ are, therefore, extra-judicial, and *coram non judice*. *id*.

JUSTICES OF THE PEACE.

1. Where a writ of summons issued from a Justice, returnable on the 16th of June, 1838, and the Justice rendered judgment, by default, against the defendant, on the 17th of June, and the record does not show that the defendant appeared on the 16th, or that the case was continued, the judgment is illegal and void. *Woolford v. Harrington*, 85.
2. Where the entry on the justice's docket was that *the plaintiff* came and prayed an appeal, and offered A. B. as special bail for his appeal: whereupon A. B. came and acknowledged himself jointly bound with said *defendant* to pay the costs and condemnation of said circuit court; signed by the justice; no valid appeal was taken by either party. *id*.
3. There can be no appeal without an order of the justice allowing it, and a recognizance. The mere prayer of an appeal, and offer to give special bail, does not constitute an appeal. Therefore, in this case, there was no appeal on the part of the *plaintiff*. *id*.
4. The *defendant* neither prayed nor took an appeal—nor did he enter into a valid recognizance—nor did the justice grant or allow him an appeal. *id*.
5. The recognizance is wholly void and nugatory. It contains no valid condition, it is not signed by the parties, and it was taken in a case where no appeal was either prayed or granted. It was made payable to no one, nor did A. B. ever become the security of the defendant in any recognizance. *id*.
5. In such case, there being no appeal, the

Circuit Court cannot assume cognizance of the cause; and any judgment which that court gives in such case is wholly illegal and void. *id*

See CONSTITUTIONAL LAW, 4, 5, 6, 7.

L

LEVY.

See SATISFACTION.

N

NEW TRIAL.

1. In order to entitle a party to a new trial, on the ground of newly discovered evidence, the affidavit in the case must show:

First, the names of witnesses whose testimony has been discovered, and the facts expected to be established by them;

Second, facts and circumstances sufficient to prove that the applicant has used due diligence in preparing his case for trial;

Third, that the facts and circumstances newly discovered, have come to his knowledge since the trial, and are such, as if adduced on the trial, would have been competent to prove the issue, and would probably have changed the verdict; and

Fourth, that the evidence discovered is not cumulative of that previously relied on, and will tend to prove material facts, which were not put directly in issue on the trial. *Burris v. Wise et al.*, 33

2. The affidavit must show affirmatively, that the newly discovered evidence is not cumulative. *id*

3. Where no part of the evidence is spread upon the record, and the affidavits of persons filed in support of the motion for a new trial set down the prices of carpenters' work and labor done, for which suit was brought, at much lower rates than they are charged in the plaintiff's bill, but fail to show that the persons making the affidavits were carpenters by trade, or judges of the prices of such work and labor, they are insufficient. *id*

4. If this testimony had been adduced on the trial, it might have been disproved by the evidence in the case. This is the legal inference following the verdict and judgment; and the appellant cannot es-

cape from it, unless he shows affirmatively, by spreading the whole testimony upon the record, that such would not have been the fact. *id*

5. An affidavit in support of a motion for a new trial, on the ground of surprise and newly discovered testimony, which wholly fails to show any clear facts or circumstances, showing that the party was surprised on the trial, or had used due diligence, gives no support to the motion. *Ballard v. Noaks*, 45

6. Where one motion for a new trial is overruled, the party making it, if he has other and better grounds, to which he was not before privy, may have the benefit thereof by a second motion for a new trial, if presented in proper time. *Robins v. Fowler*, 133

7. In order to the success of a motion for a new trial, on the ground of newly discovered evidence, the testimony must have been discovered since the trial: it must appear that it could not have been obtained with reasonable diligence on the former trial: it must be material to the issue: it must go to the merits of the case, and not to impeach a former witness; and it must not be cumulative. *id*

8. Where the evidence given on the trial is not before the Supreme Court, it is impossible to discover whether the newly discovered evidence goes to the merits or merely to impeach a former witness. *id*

9. And though the court below states in a bill of exceptions that the newly discovered evidence is material to the issue, still, unless the proof made before the jury is stated on the record, it is impossible for the Supreme Court to perceive whether the new evidence, is, in fact, material. Where the court below, in the bill of exceptions, states the newly discovered evidence to be "material to the issue, because it conduces to prove certain facts," such evidence is shown thereby to be cumulative. *id*

10. Cumulative evidence is additional evidence to support the same point, and of the same character with the evidence already produced. *id*

11. And unless the exceptions taken show that the new testimony established facts which bear directly on the issue, and were not in proof before, and which are in themselves so material to the question that they might vary the result; even though the court below states them to be material to the issue, the Supreme Court will not presume that they are not cumulative. *id*

12. A party, to entitle himself to a new trial on the ground of newly discovered

testimony, must satisfactorily show to the court, 1st. That in preparing the case for trial, he was guilty of no neglect or laches. 2ndly. That the new evidence sought to be introduced could not have been procured by due diligence at the former trial. 3dly. That such evidence is *material* and *important*, which must be shown to the court either by the affidavit of the witness himself, or by some other legal means. 4thly. That this new evidence is not cumulative in its character or consequences. *Olmstead v. Hill*, 346

13. Cumulative evidence is such as tends to support the fact or issue which was before attempted to be proved upon the trial. *id*

14. To authorize a new trial upon the ground that the verdict was contrary to evidence, it must have been clearly against the weight of evidence; so that on first blush it should shock our sense of justice and right. *Howell v. Webb*, 360

15. A motion to set aside the verdict, and grant a new trial, should be sustained, whenever it appears that the evidence adduced at the first trial wholly fails to support the allegations of the declaration; and it is error to refuse a new trial in such a case. *Hanna v. Harter*, 392

O

OFFICES.

See CONSTITUTIONAL LAW, 2 to 7.

OYER.

See PROPERTY AND OYER.

P

PARTNERS AND PARTNERSHIP.

1. To give to a clerk or agent a portion of the profits of sales, as a compensation for his labor, on the amount of goods sold, does not constitute the agent or clerk a partner in the business, if it appear that it was a mode of payment designed to increase diligence and secure exertions. *Olmstead v. Hill*, 346

2. Upon the principles of commercial poli-

cy, an agreement may constitute a partnership as to third persons, when it creates no such relation between the parties themselves. *id*

3. And, therefore, a clerk or an agent may, by his own conduct, come to be regarded as a partner by the trading community, and be sued as such, and yet at the same time be liable to an action at law by the real partners. *id*

4. For they who hold themselves out to the world as partners, are to be so regarded, as to creditors and third persons, and the partnership may be established by any evidence showing that they so held themselves out to the public, and were so regarded by the trading community. *id*

5. Between themselves, the agreement or contract alone constitutes them partners. *id*

6. An averment that two defendants executed and sealed an instrument, signed thus, "*J. H. Newman and P. Pollock*," so far from showing them to be partners, expressly disproves the fact. *Mapes v. Newman*, 469

PAYMENT.

1. When separate pleas of payment were filed to separate counts, the court was not required to instruct the jury that they should find on each count separately; but is right in instructing them to find generally. *Noel v. Dillard*, 449

2. To entitle a party to a credit under the plea of non-assumpsit, he must prove: *first*, a payment in money, or its equivalent; *second*, that it was accepted; and, *third*, its application to the particular debt. *McDonald v. Faulkner*, 472

3. Payment can, in numerous instances, be given in evidence under the plea of non-assumpsit. The plaintiff can recover no more than he is justly entitled to, in equity and conscience, which is no more than what remains after deducting all just allowances which the defendant has a right to retain in his hands. *id*

4. Where the defendant's account, including money payments and other charges, was presented to the plaintiff, who examined it, made some corrections, and then assented to its correctness, and agreed that it should be taken and considered as a credit and payment against and upon his own account, this is such a payment as can be given in evidence under the plea of non-assumpsit. *id*

5. Very slight evidence of acquiescence will show assent to any particular mode of payment. *id*

PETITION AND SUMMONS.

1. Where a petition in debt under the statute states the plaintiffs to be the legal owners of a writing obligatory against "Albert W. Webb," and sets out verbatim a writing obligatory signed "A. W. Webb," it is sufficient: and it is not necessary to aver that he signed it by his style, &c., of A. W. Webb. *Webb v. Jones et al.*, 330
2. In a suit by petition in debt, where the petition follows the statute, by stating the plaintiff to be the legal holder of a note or bond against A. B., to the following effect; and sets out *in hæc verba*, a note or bond signed by the defendant by the initials of his christian name, the petition is good. *Dudley v. Smith*, 365
3. The averments in such petition are equivalent to a statement that the defendant signed the note or bond by a particular signature. *id*
4. That no copy of the instrument sued on, separate from the copy set out in the petition, was filed, in the statutory proceeding, is no ground of demurrer. *Yeates v. Heard*, 459
5. In suit by petition in debt, where the instrument sued on is signed by an abbreviated name, it is not necessary to aver that the person sued is the same who signed it. *id*
6. In the proceeding by petition and summons, it is unnecessary to file any copy of the instrument sued on, other than that contained in the body of the petition. *Bestwick v. Flemming*, 462
7. Where a petition in debt states the instrument sued on to be a writing obligatory, a demurrer admits this averment to be true. *Mape v. Newman*, 469

PLEAS AND PLEADING.

1. Where to debt on bond, brought by A for the use of B., the defendant pleaded, that before the commencement of the suit, A. made over, transferred, endorsed, and assigned the bond to B., and delivered the bond, so endorsed, to him, and thereby parted with and transferred all his right, title, and interest, of, in, and to the bond to B.; and defendant thereby became liable to pay to B., and that A. has no interest whatever in the suit, it is a good plea in bar. *Black v. Walker*, 4
2. And a replication, that after the endorsement, B. caused the transfer and endorsement to be stricken out and erased, whereby the legal interest in the bond

again vested in A., and A. became entitled to sue, is not good. *id*

3. It is no objection on demurrer, that a joint bond is declared on as joint and several, for, by statute, all joint bonds may be sued in the same manner as if they were joint and several. *The Auditor v. Woodruff*, 73
4. In an action upon a bond, it is not necessary to aver that the bond was delivered. The allegation that it is the bond of the defendant, implies a delivery. *id*
5. Where the declaration contained five counts, two on writings obligatory, one on a promissory note, and two on simple contract debts, and *nil debet* was pleaded to the whole declaration, the plea was bad on demurrer. *Wooster v. Clarke*, 101
6. Where the record states that the defendant "demurred to the plaintiff's declaration;" but no written demurrer appears on the record, nor are any special causes of demurrer set forth, although the court was not bound to receive such a demurrer and admit it upon the record; still, if placed on the record, it is equivalent to a declaration of the defendant, made in open court, that he will go no further in the case, because his adversary has not shown sufficient matter against him. *Davies v. Gibson*, 115
7. And when admitted on the record, the court is bound to regard it as a general demurrer. *id*
8. But such a statement on the record as to the pleading of any matter of fact required by law to be specially pleaded, would be disregarded. *id*
9. Where a demurrer to the declaration was filed, in which no special causes of demurrer were assigned, it is to be considered in this court as a general demurrer; and the only question is whether the plaintiff has stated and set forth a sufficient cause of action, to legally entitle him to a recovery. *Roach v. Scogin*, 115
10. In such case, where the declaration contains two counts, each on a promissory note executed Feb. 1, 1839, by which the defendant acknowledged himself to owe and be indebted to the plaintiff in the sum of 338 84 cts., in good cash notes, and alleging that the same remain due and wholly unpaid, it is sufficient: and it was error to sustain a demurrer to it. *id*
11. All pleas to the jurisdiction of a superior court, must show, not only such facts as take the case out of the jurisdiction; but also that there is some other court in which effectual justice may be administered; for if there is no other place or mode of trial, that alone will give the Su-

- perior Court jurisdiction. *Heilman v. Martin*, 158
12. Where a defendant withdraws his general demurrer to the declaration, he must be considered as undertaking to plead issueably to the merits. *id*
13. A general demurrer is regarded as a plea in bar, and a defendant, after interposing it, is precluded from pleading, either to the jurisdiction, to the disability of plaintiff or defendant, to the count or declaration, or to the writ, in abatement; and if he does so plead, the plaintiff may properly move to strike out his plea, or may disregard it altogether. *id*
14. The personal disability of a ward to sue his guardian is matter in abatement only; and therefore, under the general issue, in an action of assumpsit for work and labor done, by ward against guardian, evidence proving the relation of guardian and ward to exist, is not admissible. *id*
15. This is only necessary in cases where the plaintiff sets forth such facts as present a case within the jurisdiction of the court, although the true and real matter of controversy is not within its jurisdiction. *id*
16. The act of 1836, authorizing the Auditor of Public Accounts "to sue for any demand which the people of the State may have a right to claim," &c., was in force on the 7th of September, 1838, and authorized him to sue, as Auditor, on a Sheriff's bond, given to the Governor and his successors in office. *Taylor, et al. v. The Auditor*, 174
17. But his right, so to sue, depends upon the interest which the State or people have in the debt, or thing demanded, and their right to claim the same; and, therefore, the people's interest in, or right to claim the demand, must appear by some appropriate averment in the pleadings, to enable him to maintain the action. *id*
18. Where, therefore, suit is brought by the Auditor, for the use of the State, and he declares for the penalty of a Sheriff's bond, given to the Governor and his successors in office, a copy of which bond, with the condition, is given and accepted as oyer, and the only material points in the declaration, tending to show his right to sue, are, that he is Auditor; that he sues as Auditor for the use of the State; and that by virtue of the statute an action has accrued to him as Auditor to sue for the penalty of the bond for the use of the State; the declaration shows no legal right in the people of the State to claim the debt demanded. *id*
19. The right of the State to sue in such case, not appearing in the declaration, is bad on demurrer, in arrest of judgment, or on error; and a demurrer to it should, for this cause, have been sustained, although it was not specially stated as ground of demurrer. *id*
20. Where a joint and several co-obligor was not sued, and it appeared from the declaration that he was still living, it was good ground of general demurrer at common law; and may, perhaps, be a valid objection to a declaration in a suit commenced before the adoption of the Revised Code; where it does not appear in the declaration that the obligors reside in different counties; for if such be the case, the plaintiff should show it by proper averment in the declaration, in order to sue part, and not all of the obligors. *id*
21. But the objection that parties who ought to be joined were omitted, was not available, even at common law, on demurrer, unless it appeared in the declaration that they were still living. If this did not appear, the objection could only be taken advantage of by plea in abatement. *id*
22. Where only a part of the co-obligors in a bond are sued, it is not necessary to mention those who are sued, in the declaration; and if mentioned, it is not necessary to aver that they have not paid the bond. Nor is it necessary, in such suit, to aver any demand or request of payment. *id*
23. And as the objection for non-joinder cannot be taken on demurrer, unless it appears in the declaration that the party not sued, both signed and sealed the obligation, and is still living, therefore, if he is alleged to be dead, it is not necessary to state that he executed the obligation. *id*
24. A plea, simply alleging acceptance of a smaller sum of money, in satisfaction of a larger, is bad; but if it alleges the payment of a less sum before the day of payment stipulated in the contract, or at a different place; or the delivery of a specific article in satisfaction, and acceptance thereof in satisfaction, it is good: so a plea alleging payment of a less sum by a third person, and acceptance in satisfaction. *Pope v. Tutstall*, 209
25. If a debtor give his note, endorsed by a third person, as further security for part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt; and may be pleaded in bar as an accord and satisfaction. *id*
26. In debt on bond, a plea avering that before suit brought, the obligees in the bond had taken a third person into part-

- nership; that before suit the defendant, with two securities, executed to the new partnership a new bond, on longer time, which was accepted and received in full satisfaction and discharge of the bond sued on; these facts being aptly pleaded; is a good plea in bar of accord and satisfaction. *id*
27. Matters of fact set up in any pleading are upon demurrer regarded as admitted to be true; and the simple question presented is, as to their legal sufficiency. *The State v. Stevenson*, 260
28. But it is facts only, and not inferences or deductions of the pleader, that are to be taken as true; and such inferences or deductions, though improvidently or needlessly stated, are to be altogether disregarded as irrelevant and impertinent. *id*
29. And an allegation that a particular law was in force at a particular time, is within this rule; and is not a fact, the truth whereof is admitted by demurrer.
30. In replevin the plea of *non cepit* admits the property of the slaves or other property replevied, to be in the plaintiff, and that he was previously in possession. *Wilson v. Royston*, 315
31. The plea of *non cepit* puts in issue no thing but the caption; and the place, where that is material: and under it the plaintiff cannot show property out of the plaintiff. *id*
32. And where *non cepit* is pleaded, together with a plea of property in a third person, and not in the plaintiff, the pleadings narrow the case to the taking of the goods, and whose property they were at the time of the caption. *id*
33. The failure or omission of a non-resident plaintiff to file bond for costs before he instituted suit, is matter in abatement only: and if the defendant pleads in bar, the objection is waived. *Webb v. Jones et al.*, 330
34. Where a petition in debt under the statute states the plaintiffs to be "the legal owners of a writing obligatory against Albert W. Webb," and sets out verbatim a writing obligatory signed "A. W. Webb," it is sufficient: and it is not necessary to aver that he signed it by his style, &c., of A. W. Webb. *id*
35. In debt upon a bond it is sufficient and proper to aver that by his writing obligatory, &c., the defendant "promised to pay." *Bank of State v. Clark*, 375
36. In a suit by the State Bank on a note or bond executed to that institution, it is unnecessary to aver that by the non-payment of the note or bond the defendants became liable to pay interest at the rate of ten per centum per annum; or to negative in the breach the payment of such interest. *id*
37. The court is bound judicially to know what the legal interest is, and to give judgment accordingly. *id*
38. In a bond executed to the Governor, and his successors, by an administrator, &c., the Governor holds the legal interest as a naked trust, and no injury appears to have been sustained by the *cestui*, for whose use the suit is brought, until a special breach or breaches are assigned. *Phillips v. The Governor*, 382
39. In such suit, therefore, each breach must specially state the facts on which the right of action of those for whose use the suit is brought depends, with as much certainty and precision as is required in the counts of a declaration. *id*
40. If the plaintiff fails to suggest or assign the proper breaches no cause of action is shown to have accrued. *id*
41. A breach is well assigned, if in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import or effect. *id*
42. And where, on such a bond, the breach amounts merely to a general statement that the administrator has done nothing which he was bound to do, it is fatally defective. *id*
43. If a suit on such bond is brought for the use of heirs, they must show by positive and specific averments their interest in the estate; and how, and in what manner, they have been deprived of their interest in the estate by the devastavit of the administrator.
44. In action on the case, a recovery, release or satisfaction need not be pleaded, but may be given in evidence under the general issue. Whatever will in equity and conscience preclude the plaintiff's right of recovery, may be given in evidence. *Jones v. Buzzard, et al.*, 415
45. So much of the 4th section of chapter 116 of the Revised Statutes, as confines the bringing of suits in the Circuit Court, in cases where the defendant resides in the State, to the county where the defendant resides, or where the plaintiff resides and the defendant is found, is unconstitutional and void; and no averment in the declaration as to the residence of either party, is necessary for any purpose whatever. *id*
46. Endorsements of payment are merely evidences of payment of the same grade as a receipt, and may be explained or controverted by the plaintiff. *id*
47. Consequently, if such endorsements show the sum in controversy to be below the jurisdiction of the court, no ad-

- tage can be had of it on demurrer. The only way to raise the question is by plea in abatement, a finding upon which would settle the question of jurisdiction. *id.*
48. In declaring upon a covenant, it is not necessary to set out the exact words of the agreement, but only to state its legal effect, according to its true meaning and intention. *Roydon v. Sumner*, 465
49. Whenever a covenant is in its terms defective, it ought to be set out according to its legal consequences. *id.*
50. Where a client covenanted with an attorney that he would pay him a certain sum in case he (the client,) should gain a certain suit, in which he had employed the attorney, the declaration on the covenant properly stated the covenant to be that the client would pay that sum in case the attorney gained the suit; and an averment that the attorney did gain the suit for his client, is a sufficient averment of the condition precedent to the covenant. *id.*
51. An averment that two defendants executed and sealed an instrument, signed thus, "J. H. Newman and P. Pollock," so far from showing them to be partners, expressly disproves the fact. *Mapes v. Newman*, 469
52. When a party sues, as executor, &c., there must be a substantial averment in the pleadings, showing that he sues in his representative capacity, and nothing by intentment can be taken to supply the want of such an allegation. *Sabin v. Hamilton*, 581
53. But it is immaterial in what part of the declaration or pleadings such averment occurs. And therefore, where, in the breach, the declaration alleges that the defendant "has not paid to the intestate in his lifetime, nor to the plaintiff *as administrator aforesaid*," this is sufficient. *id.*
54. Where a party to a covenant by which he was bound to do certain acts, upon the performance of which the other party was to become indebted to him in a certain sum, endorses upon it under his seal, that he *certifies* that the agreement has been complied with on his part, and that the other party is therefore indebted to him as provided in the covenant, all of which, in consideration of a certain sum to him in hand paid by a third person, he assigns to such third person; and adds, that the other party to the covenant "will, on sight, pay to such third person" the amount according to contract: such endorsement is a covenant. *id.*
55. And in it are contained three distinct and separate covenants: first, that the covenantor had performed his part of the original covenant; second, that the other party to the original covenant was indebted to him in the amount specified; and third, that said party would pay it on sight. *id.*
56. And in a declaration upon such covenant, the breach is not sufficient where it is, merely, that the covenant sued on was presented to the other party to the original covenant, and that he refused to pay according to its true meaning and effect. *id.*
57. In an action against an attorney, for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person calling for so many dollars, to bring suit on, recover and collect of a third person, for the use and benefit of the plaintiff, for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict upon it in favor of the plaintiff will not sustain the judgment. *Sevier v. Holiday*, 512
58. No title to the note, in the plaintiff, is stated by, or implied in, any of these allegations; and no facts are stated, which could not be proven, without at the same time establishing the plaintiff's title to the note, or legal right to receive the proceeds. *id.*
59. Nor is it stated or implied that the note was due when so delivered, nor to whom it was payable, nor what sum, (if any thing,) was due upon it. *id.*
60. Such a count shows a defective title, and not a title defectively stated: and no proof is admissible under such a count, which can make it good. *id.*
61. In trover for a note, the omission to state in the declaration that the plaintiff was possessed of the note as of his own property, or that it came to the possession of the defendant by finding, would be fatal on general demurrer, but is probably cured by verdict. *id.*
1. In a suit commenced by a writ of garnishment under the Territorial statute, the plaintiff had the right to deny the truth of the answer, and to empanel a jury to try the issue so made up. *Walker v. Bradley*, 578
2. Consequently an action of garnishment does not go off, like an injunction, on the coming in of answer; nor can the defendant move to dismiss on its coming in. *id.*
3. If the answer of the garnishee disclose funds and available means placed in his hands by one of the judgment debtors, for the purpose of paying off the same debt, it is sufficient to charge the garnishee. *id.*

66. The garnishee, upon answering, might produce in court the goods, moneys, credits and effects in his hands, and claim to be discharged with costs. *id*
67. If he failed in this, and the court ordered him to proceed and collect the notes, accounts, receipts, &c., in his hands, and he made no objection to such order, he could be subsequently ruled to account; and if no such rule being made he rendered no account, nor discharged himself from liability by showing that he could not collect the debts in his hands, the court was right in decreeing against him for the whole amount of evidences of debt before then admitted to be in his hands. *id*

See PETITION AND SUMMONS.

PRACTICES IN THE CIRCUIT COURTS.

1. Where an action was commenced against two defendants, before a Justice, who rendered judgment, by default, against the defendants without any appearance, and it appears from the docket merely that "the defendant" appealed; if judgment is again rendered by default in the Circuit Court, against both defendants, it is error. *Woolford v. Howell*, 1
2. In such case, the entry in the record of the Circuit Court, of the appearance of "the parties," must be considered as applying only to those who were under legal obligation to appear, by service of process, or otherwise. *id*
3. The defendant, by appearing generally, waives all exceptions to the writ or return, or at least is precluded thereby from taking any advantage of them. *Rose v. Ford*, 26
4. But he has no legal right to *appear to*, or *defend* the action, after judgment rendered against him. He then has no day in court. *id*
5. Praying an appeal, therefore, is no such appearance as waives any objection to the writ or return. *id*
6. An appeal may be taken by the defendant, under our statute, after a judgment by default, without first applying to the court to set aside the judgment. *id*
7. If, after his motion to quash the writ is overruled, the defendant appears and pleads to the action, he waives all defects in the writ, if any existed. *Burris v. Wise et al.*, 33
8. A party to the record, cannot in general be examined as a witness in the case. *Ballard v. Noaks*, 45
9. A co-trespasser or co-tortfeasor, is not in general a competent witness on either side. A joint trespasser who has suffered judgment to go against him by default, is not a competent witness for the plaintiff. *id*
10. In both criminal and civil cases, a party who is put on trial at the same time with other co-defendants, cannot be used as a witness until he has been first acquitted or convicted. A verdict restores his competency, provided it does not render him infamous. *id*
11. To entitle one defendant, where several are put on trial together, to a verdict first in his own case, it must satisfactorily appear to the court which tries the cause, that no evidence has been adduced against him, and that his testimony is important for the other defendants. *id*
12. This privilege is awarded him, upon the express condition that there has been no proof against him tending to prove the charge laid; for if there are any facts or circumstances to convict him, still he has no right to have his case left to the jury, and afterwards to come in and testify. *id*
13. Where the plaintiff has closed his testimony, and has wholly failed to adduce any evidence against some of the defendants, it is the duty of the court to permit the jury to retire and find a verdict of acquittal as to those defendants, if the others wish to use them as witnesses, and show by affidavit or otherwise that their testimony is material. *id*
14. And if the court, in the exercise of this discretionary power should commit a clear, palpable error, seriously prejudicing the rights of other defendants, it could be reached by appeal or on error. *id*
15. Where, in an action of debt upon an official bond, proferet is made of the original, and upon oyer a copy is filed, the defendants might have refused to accept a copy as oyer, or dispense with the production of the original, or to plead until it was produced. *The Auditor v. Woodruff*, 73
16. But by pleading to the action, (and a murrer is regarded as a plea to the action,) every objection to the oyer, as that it has been irregularly, improperly, or insufficiently granted, is waived. *id*
17. It is, therefore, no objection on demurrer, that *proferet* was made of the original, and oyer granted by filing a copy. *id*
18. Under the Territorial Statute, the party demurring could avail himself of any defects in the pleading not demurred to, though specially set down as causes of demurrer. *id*
19. When, therefore, a case comes into

- this court, decided on demurrer in the court below, under the Territorial Statute, if the court below sustained the demurrer, and there is any material defect, fatal on demurrer, which was not assigned among the special causes of demurrer, the decision will be sustained, though the special causes assigned were insufficient. *id*
20. Oyer granted is a part of the previous pleading, and the plaintiff is bound by it as long as it remains of record in the case, even though it may have been improperly or unnecessarily granted; and the defendants can avail themselves of any defect manifest upon, or produced by it. *id*
21. Where, the pleas of *nil debet*, *payment* and *set-off*, were put in, and the plaintiff demurred to the plea of *nil debet*, and filed replications to the pleas of *payment* and *set-off*, tendering an issue to the country in each, to which the defendant does not add a *similiter*, the plaintiff is not warranted by law, upon his demurrer being sustained, in taking judgment by *nil dicit*. *Wooster v. Clark*, 101
22. Judgment, by *nil dicit*, may be rendered, where the defendant, after he has appeared to the action, has not pleaded at all, or not within the time prescribed by law or the rules of the court; or not in the proper manner; or where he has pleaded some plea not adapted to the nature of the action, or to the circumstances of the case or the like. *id*
23. But where he has pleaded within the time prescribed, and in a proper manner, pleas adapted to the nature of the action and circumstances of the case; and which, if determined in his favor, upon an issue properly formed therein, would bar the action, or so much thereof as the pleading purports to answer; and to which the plaintiff has replied, merely negating the facts pleaded, and concluding to the country, a judgment by *nil dicit* is not warranted by law. *id*
24. In such a case, there is an issue upon the record, without the *similiter*, which is mere matter of form, and may in all such cases be added by the plaintiff, subject to be struck out by the defendant if he wishes to demur. *id*
25. The *similiter* is mere matter of form, and if not implied in the "*&c.*" added to the replication, at least the duty is imposed on the plaintiff of adding it, and trying the issues, instead of taking judgment by *nil dicit*. *id*
26. The want of bond for costs, where the plaintiff is a non-resident, may now be taken advantage of by motion: but the law now allowing that to be done, does not change the nature of the defence, or prescribe the time within which the defendant shall be at liberty to avail himself of it. *Clark v. Gibson*, 109
27. It is, therefore, still matter in abatement only, whether interposed by plea or motion; and if, instead of availing himself of this defence at the proper time, the defendant interposes a defence to the merits, he waives the objection altogether. *id*
28. And the rule is the same whether he pleads generally to the merits, or demurs before or after his motion to dismiss. In either case he waives the objection. *id*
29. A joinder in demurrer is mere matter of form, and may be filed at any time; and, therefore, where the defendant demurred to the declaration, to which demurrer the plaintiff filed no joinder, and the court gave judgment for the plaintiff without regarding the demurrer, it must be presumed that the court overruled the demurrer, and adjudged the declaration sufficient in law. *Davies v. Gibson*, 115
30. The provisions in the Revised Statutes, in regard to demurrers and amendments after demurrer, do not essentially differ from those contained in *St. 27 Eliz.* and *4 & 5 Anne*, taken together, and the adjudications upon the latter will generally apply to such cases as arise under the former. *id*
31. The party demurring is required specially to express in his demurrer the particular defect or imperfection which vitiates the pleading; and is prohibited from so expressing in his demurrer any matter which is only cause of special demurrer at the common law; while it is enjoined upon the court to amend any defect or imperfection not so expressed in the demurrer. *id*
32. When the pleading, so amended, exhibits sufficient matter to enable the court to give judgment according to the right of the cause, judgment must be given thereupon, without regarding any defect or imperfection in the pleading. *id*
33. But this general rule is to be understood with this exception, that the court cannot amend as to matters of fact which are not in any manner stated by the parties. When, therefore, the facts stated cannot, under any form of stating them, be made to exhibit a legal cause of action or ground of defence, the court is bound to decide the matter against the party, whose pleading is so defective, because he does not show any legal right to the thing in demand. *id*

34. Where the plaintiff in an action *ex contractu* entered a *nolle prosequi* as to two out of three defendants, and then filed his amended declaration to which he made those two again defendants, and again subsequently entered a *nolle prosequi* as to them; *quere*, as to what would have been the result had objection been taken to filing such amended declaration? *Robins v. Fowler*, 133
35. But at all events, the objection, if any, was waived when the other defendant appeared and made defence. *id*
36. Where the record states that defendants severally filed special pleas of justification, besides jointly pleading the general issue; but no such pleas appear on the record; and further states, that the defendants, being served with a notice to produce the papers under which they severally so justified, failed and refused to produce them, but no such notice appears on the record; the record fails to show any requisition on them to produce the papers, and they do not appear to have been under any legal obligation to produce them. *Cole v. Wagmon*, 154
37. In such case it was error to sustain a motion by the plaintiff to disregard such pleas, and give judgment by default. *id*
38. Where the plea of the general issue, purports to be the plea of one defendant only, if judgment by default, for the failure of one defendant to plead is given against both, it is not good as to either. *id*
39. It was error to disregard the plea of not guilty and render judgment by default, even if papers on which the defendants relied in their special pleas, were not produced after due notice. The defendants could only be defaulted as to that part of their defence to which the papers not produced applied. *id*
40. A suit commenced by the Auditor, when he was authorized by the act of 1836, to bring such suit, and in which judgment obtained by him is reversed, after he is divested of such right to sue, may still proceed to final judgment in his name, after its return to the Circuit Court upon reversal. *Taylor v. The Auditor*, 174
41. When the Legislature authorized an appeal from the decision before a Justice of the Peace, they intended merely to give to the party appealing, an opportunity of again bringing before another court and jury the matter in controversy, and to have the same again tried and determined on its merits. *Ball v. Kuykendall*, 195
42. The defendant before a Justice, by appealing, precludes himself from taking advantage of any irregularity in the proceedings before the Justice; and must rely alone on his defence to the merits. *id*
43. He cannot, therefore, in the Circuit Court, plead in abatement the misnomer of the plaintiff. *id*
44. Under the Revised Statutes, in suits on penal bonds, the jury must be sworn to inquire into the truth of the breaches, as well as to assess the damages; and the judgment must be entered for the penalty of the bond, with costs; and the plaintiff have execution for the damages. *Phillips v. The Governor*, 382
45. When such a contract is alleged in the declaration, as, if proved or admitted, would justify the recovery of a sum exceeding one hundred dollars, the jurisdiction of the Circuit Court, in such case, can only be questioned by a plea in abatement. *Hanna v. Harter*, 392
46. A motion to set aside the verdict, and grant a new trial, should be sustained, whenever it appears that the evidence adduced at the first trial wholly fails to support the allegations of the declaration; and it is error to refuse a new trial in such case. *id*
47. Credits endorsed on a note or bond, although set out on oyer, form no part of the note or bond, and become no part of the declaration, nor can they be noticed or regarded on demurrer. *Dillard v. Noel*, 449
48. A plea to the jurisdiction comes too late after demurrer, and will be stricken out. *id*
49. When separate pleas of payment were filed to separate counts, the court was not required to instruct the jury that they should find on each count separately; but is right in instructing them to find generally. *id*
50. A motion to dismiss is waived by a subsequent demurrer which presents the same point. *Yeates v. Heard*, 459
- See BILLS OF EXCEPTIONS, 4 to 9. CONTINUANCE, 1 to 6. GARNISHMENT, 6, 7. JURISDICTION, 5, 6, 7. NEW TRIAL, 1 to 9. PLEAS AND PLEADINGS, 6 to 10, 12, 13, 14, 20 to 23, 33, 46, 47.

PRACTICE IN ERROR.

1. Where, to the transcript of the record sent up to the Supreme Court a paper is found appended, purporting to be a statement of the testimony given in the case, detailing the evidence, signed by

- the Judge below, and marked filed by the clerk, it is no part of the record, and cannot be regarded in the Supreme Court. *Lenox v. Pike*, 14
2. Whatever proceedings or facts the law or the practice of the courts requires to be enrolled, constitute and form a part of the record—such as all judicial writs and process, the finding of a jury, the judgment of the court, and the like. *id*
3. Whatever is not necessary to be enrolled, such as oral and written testimony, exceptions, &c., constitute no part of the record, unless they are expressly made so by order of the court, by agreement of parties, by demurrer to evidence, by oyer, by bill of exceptions, or by special verdict. *id*
4. The statement of the evidence in this case, must be regarded as a mere loose paper on the files of the Clerk, or the memorandum of the Judge of his notes on the trial. *id*
5. If a party wishes to avail himself of any matter upon error, which does not necessarily appear of record, he must file exceptions at the trial, or request a special verdict. *id*
6. Even if the statement of the testimony in this case could be considered as a bill of exceptions, still it could not be considered in the Supreme Court, as it does not appear to have been taken during the trial, or upon any motion made in the court below. *id*
7. Bills of exception are only allowable during the trial, and that they were then taken must appear on their face. If reduced to form, and signed, after the trial, it must appear that they were taken at the trial. *id*
8. He who impeaches the judgment of an inferior court, is bound to show to the appellate tribunal in what the error consists, of which he complains. He must be able to lay his finger upon the error, and point it out, if he seeks to reverse or correct it. *id*
9. And in the appellate court, every thing will be presumed in favor of the verdict, and the judgment of the court below, except what is affirmatively disproved by the record, or what the court is bound judicially to take notice of. *id*
10. Although the evidence spread on the record is not sufficient, when taken by itself, to sustain the judgment, yet if the record does not state that *no other* testimony was adduced, it will be presumed that there was other testimony sufficient to sustain the verdict and judgment. *Ballard v. Noaks*. *id*
11. It would be the better practice not to regard a general assignment of errors, although it has never been expressly ruled or implicitly observed in this court. *Smith v. Dudley*, 68
12. Upon a motion to dismiss a suit for want of a bond for costs, on the ground of non-residence of the plaintiff at the institution of the suit, no question as to the sufficiency of the security could legitimately arise, until the fact of the plaintiff's non-residence was established, which could only be done by his own admission or other competent legal testimony. *id*
13. And where the fact of the plaintiff's non-residence is no where stated in the record, nor stated or recited, in the bond for costs, the presumption is that the court below was right in overruling the motion to dismiss. *id*
14. Where, therefore, in debt on bond, the copy of the bond, given on oyer, as it appears in the transcript of the record, shows a contract simply signed with the names of the defendants, but without any seal, or scrawl by way of seal, affixed to them, though over the names the words "witness our hands and seals," are used, the instrument given on oyer appears not to be a bond, and is variant from that sued on; and this is such a variance as is fatal on demurrer, or on error. *The Auditor v. Woodruff*, 73
15. The court can know nothing except what appears on record, nor can they presume a diminution in such case, and award a certiorari to supply it. *id*
16. A certiorari is sometimes awarded by the court *ex-officio*, for their own satisfaction, or to enable them to *affirm*; but never with a view of supplying matter to enable them to reverse the judgment, nor is it ever done, unless the diminution appears from an inspection of the transcript itself. *id*
17. Where it is assigned for error that the court below erred in overruling a motion to dismiss for want of a bond for costs, in order to obtain a reversal, the record must establish the non-residence of the plaintiff. If it does not, the presumption is in favor of the decision below. *id*
- Davies v. Gibson*, 115
18. If the final judgment rendered is, upon the whole record, authorized by law, no court exercising appellate jurisdiction over the subject, will reverse or disturb it, though errors and irregularities in the previous proceedings, not affecting the merits of the case, may appear in the record. *id*
19. Where the declaration is sufficient, and the defendant has not specified in his de-

- murrer in what particular the pleading is defective, the court cannot regard such defect or imperfection, but is bound to amend the same. *id*
20. Therefore, the question of variance between the writing given on oyer, and the declaration, cannot arise in this court. *id*
21. No bond for costs is required in the Supreme Court. *Dillard v. Noel*, 133
22. A party may appeal to the Supreme Court without recognizance, which is only necessary to obtain a supersedeas. *Childress v. Foster*, 123
23. To sustain a writ of error upon the ground that the court below neglected to charge the jury upon any question of law which arose out of the facts of the case, it must appear upon the record, not only that the facts upon which such question of law arose were in evidence in the case, but also that the court was distinctly called on to instruct the jury on that point. *Robins v. Fowler*, 133
24. If the appellant fails to file a transcript ten days before the first day of the return term, upon the appellee producing the certificate of the Clerk of the Circuit Court that an appeal has been entered and recognizance given, the appellant will be ruled to show cause why the judgment should not be affirmed; and if he show no cause at the return of the rule, the judgment will be affirmed with costs. *Pogue v. Richards*, 153
25. Where the record states that the defendants severally filed special pleas of justification, besides jointly pleading the general issue; but no such pleas appear on the record; and further states, that the defendants, being served with a notice to produce the papers under which they severally so justified, failed and refused to produce them, but no such notice appears on the record; the record fails to show any requisition on them to produce the papers, and they do not appear to have been under any legal obligation to produce them. *Cole v. Waggon*, 154
26. In such case it was error to sustain a motion by the plaintiff to disregard such pleas, and give judgment by default. *id*
27. But as no such special pleas appear in the record, they cannot be regarded as interposing any defence to the action: nor can the Supreme Court know what the facts so pleaded were, or whether they were so pleaded as to constitute a legal bar to the action. *id*
28. And the judgment below, in such case, being against the party pleading, there being nothing in the record to prove the judgment wrong, or that such pleas were applicable to the case, or legally sufficient in bar, the judgment will not be set aside, although the reason assigned by the court for disregarding such pleas, is illegal or insufficient. *id*
29. In appeal or writ of error, in criminal cases, the statute requires the Supreme Court to consider the whole record, (no assignment of errors being necessary,) and to render such judgment thereon as may appear to be authorized by law. *Dunn v. The State*, 229
30. No question upon a demurrer to a plea in abatement can be raised in this court, if, after demurrer sustained, the defendant pleaded in bar. *Webb v. Jones, et al.*, 330
- See PRACTICE IN CIRCUIT COURT, 18, 19, 20.

PRESUMPTIONS.

1. The law presumes that every public officer will perform his official duties according to law; and if the facts stated by the sheriff in his return, show a legal service, the truth of the return cannot, as a general rule, be collaterally questioned by the parties to the proceedings. *Ross v. Ford*, 26
2. Unless the jurisdiction be shown, and the cause of action proved, no legal presumption can attach in favor of the judgment below. *Smith v. Dudley*, 60
3. The moment the jurisdiction is properly shown, and a good cause of action well laid and proved, the judgment or other judicial proceeding draws to itself all the legal presumptions in its favor, which of course stands until it is overthrown by other affirmative matter in the record. *id*
4. Where A. sues for the use of B., and the facts are that the attorney appearing for the plaintiff knew nothing of A., nor where he resided, that he appeared for B. by retainer of B., that B. had possession of the instrument sued on, and filed it, that the Constable had receipted to C. for it, as received by his hands of A., and that the receipt was assigned by C. to B., the legal presumption is that B. was the bona fide holder of the instrument, and equitably entitled to its proceeds. *Cartwell v. Menifee*, 356
5. And this presumption being in no way impugned, the admission that the attorney was retained by B., shows a sufficient legal authority in him to appear. *id*
6. Where an attorney sends a claim to another for collection, and the latter collects the money and refuses to pay it over

to the plaintiff except upon the order of the former, the presumption is that the latter was the agent of the former; and this presumption amounts to full and satisfactory proof, unless it is rebutted or explained by competent testimony. *Cummins v. McLain*, 402

7. If the latter attorney, in such case, had collected the money, and refused to pay it over, the former would be liable, but not without demand on himself, and his own refusal to pay. *id*

8. To sustain an indebitatus assumpsit count against an attorney, he must actually have received the money; unless from the special facts a legal presumption arises that he has received the money; and it is questionable whether even this exception prevails in case of an attorney. *id*

9. In proceedings under the attachment law, the answer of a garnishee is *prima facie* evidence of the truth of the allegations it contains. *Mason v. McCampbell*, 506

10. But these allegations may be rebutted or disproved by any other competent evidence. *id*

11. And where it is assigned for error that the court below refused to instruct the jury that the answer of the garnishee under oath should be taken as true until disproved by the plaintiff, the bill of exceptions should set out all the evidence in the case, or show that there was no other evidence. *id*

12. If this is not done, the legal presumption is that the court below refused to give the instruction, because the answer was disproved or rebutted. *id*

13. After verdict, nothing is to be presumed, except what is expressly stated in the declaration, or what is necessarily implied from the facts that are stated: that is, where the *whole* is stated to exist, the existence of the *parts* is implied; and where the *claim* is alleged to exist, the existence of the *component links* will be implied after verdict. *Sevier v. Holliday*, 512

14. If the plaintiff wholly omits to state a good title or cause of action, even by implication, matters which are neither stated nor implied need not be proved at the trial, and there is no room for intentment or presumption; as the intentment must arise from the verdict, when considered in connection with the issue upon which it was given. *id*

See PRACTICE IN ERROR, 6, 9, 10, 12, 13.

PRINCIPAL AND AGENT.

1. If a person undertakes to contract as an

agent for an individual or a corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible. *Hite v. Kendall*, 338

2. The agent, when sued upon a contract, can only exonerate himself from responsibility by showing his authority to bind those for whom he is undertaking to act. *id*

3. Consequently, where a note is given in the words "the steamer Tecumseh and owners promise to pay," &c., signed "F. C. Kendall," the person who signs the note is responsible, unless he shows that he had authority to contract for the steamer and owners. *id*

PRIVILEGES.

See TAXATION, 1 to 13.

PROFERT AND OYER.

1. Where in debt on bond, the copy of the bond given on oyer, as it appears in the transcript of the record, shows a contract simply signed with the names of the defendants, but without any seal, or scrawl by way of seal, affixed to them, though over the names the words "witness our hands and seals," are used, the instrument given on oyer appears not to be a bond, and is variant from that sued on; and this is such a variance as is fatal on demurrer, or on error. *The Auditor v. Woodruff*, 73

2. If the writing sued on be not made a part of the record by oyer or otherwise, it is no part of the record, though a copy of a writing agreeing with that sued on is found among the papers. And it makes no difference that oyer was regularly craved, if the record does not show that it was granted. *Clark v. Gibson*, 109

3. Credits endorsed on a note or bond, although set out on oyer, form no part of the declaration, nor can they be noticed or regarded on demurrer. *Dillard v. Noel*, 449

4. They are merely evidences of payment, of the same grade as a receipt, and may be explained or controverted by the plaintiff. *id*

5. Consequently, if such endorsements show the sum in controversy to be below the jurisdiction of the court, no advantage can be had of it on demurrer. The only way to raise the question is by plea in abatement, a finding upon which would settle the question of jurisdiction. *id*

See PRACTICE IN CIRCUIT COURT, 15, 16, 17, 20.

Q

QUANTUM MERUIT.

1. Where a party stipulates to build a mill, which shall cut or grind a certain quantity, for an agreed compensation, and fails in the performance of the contract, he cannot afterwards recover on a *quantum meruit* count for the value of the work, and labor done, and materials furnished. *Simpson v. McDonald*, 370
2. But if after failure, he is permitted by the other party to go on and rebuild the mill, which work is afterwards accepted, without any objection to its sufficiency, a recovery by suit may be had of the value of such work on the implied contract. *id*
3. To allow one to perform a piece of work, without a special agreement, and afterwards to accept it, raises in law an implied contract by the party for whom the work is done to pay what such work is worth. *id*

R

RECOGNIZANCE.

See PRACTICE IN ERROR, 22.

RECORD.

1. Where a record is first shown, by proper evidence, to be lost or destroyed, it is competent to prove its existence by a sworn or authenticated copy. *Smith v. Dudley*, 60
2. But to warrant such evidence, the document must be *vetustate temporis aut judicaria cognitione roborata*. *id*
3. But in all the cases on this subject, the question arose incidentally on the trial, and in no instance did the lost record itself constitute the sole foundation or cause of the proceedings. *id*
4. Without some legislative provision, this court would be exceedingly unwilling to declare, that a lost judicial record, which constituted the sole foundation or cause of action, could be proved or verified merely by *parol*. *id*
5. Such a proposition can derive no support or countenance from the principles of the common law, and there is no statutory regulation in regard to the matter. *id*
6. If the writing sued on be not made a part of the record by *oyer*, or otherwise, it is no part of the record, though a copy of a writing agreeing with that sued on is found among the papers. And it makes no difference that *oyer* was regularly craved, if the record does not show that it was granted. *Clark v. Gibson*, 109
7. Where the record states, in the judgment rendered, that "it appears to the satisfaction of the court that the defendant has had due notice of his motion" for judgment; the record does not show any legal notice, either actual or constructive, of the proceedings against him. *Webb v. Hanger*, 124
8. A court cannot reinstate upon the record a judgment, the original of which has been lost or destroyed. *id*
9. The records of a court composed of several members, or having by law one presiding officer, are not usually signed by every member of the court: and when any member of a court is once shown by the record to have taken his place upon the judicial seat, upon any particular day of a term, his presence and participation in all the business transacted in court during that day, must be presumed until the contrary is proven. *Heilman v. Martin*, 158
10. Papers copied into the transcript, purporting to be instructions asked for, and given or refused, marked on the margin with the word "given" or "refused," opposite each instruction, are no part of the record. *Jones v. Buzzard*, 415
11. And where a party moves for a new trial because the verdict was contrary to law; and because, second, certain instructions were refused; but does not except to the opinion of the court overruling his motion for a new trial, he is equally as far from making the instructions a part of the record. *id*
12. The fact that no exceptions were filed, proves that the court was right in refusing the motion for a new trial. *id*
13. Where a writ of attachment is made part of the record, and recites the affidavit on which it issued, such recital does not make the affidavit a part of the record, though separately copied into it. *id*

See BILLS OF EXCEPTIONS, 4 to 9. JURISDICTION, 1 to 5. PRACTICE IN ERROR, 1 to 6.

REPLEVIN.

1. In replevin the plea of *non cepit* admits the property of the slaves or other property replevied, to be in the plaintiff, and that he was previously in possession *Wilson v. Royston*, 315
2. The plea of *non cepit* puts in issue nothing but the caption; and the place, where that is material: and under it the defendant cannot show property out of the plaintiff. *id*
3. And where *non cepit* is pleaded, together with a plea of property in a third person, and not in the plaintiff, the pleadings narrow the case to the taking of the goods, and whose property they were at the time of the caption. *id*
4. A plaintiff, who has a general or special property of goods, coupled with possession, either actual or constructive, can maintain replevin: and it was error to instruct the jury that a plaintiff must have actual possession to enable him to maintain replevin. *id*

RETURN OF PROCESS.

1. A sheriff's return on a writ of summons in the following words, "executed the within by reading, April 8th, 1839," is not sufficient to sustain a judgment by default. *Ross v. Ford*, 26
2. The law presumes that every public officer will perform his official duties according to law; and if the facts stated by the Sheriff in his return, show a legal service, the truth of the return cannot, as a general rule, be collaterally questioned by the parties to the proceedings. *id*
3. But where the return, admitting all the facts stated in it to be true, essentially fails to show a valid legal service, the court cannot supply the omission. *id*
4. After judgment, amendments in the return of service can only be made in matters of form. *id*
5. The defendant, by appearing generally, waives all exceptions to the writ or return, or at least is precluded thereby from taking any advantage of them. *id*
6. Where a writ issued under the Territorial statute, but the Revised Statutes went into force before it was served, the Sheriff was to be governed by the latter, as to the service and return. *id*
7. Where the writ and declaration went out together, it was necessary to be shown in the return that the writ was read to the defendant, and that it was read to him in the proper county. *id*

S

SATISFACTION.

1. Levying an execution on the property of a judgment debtor is no satisfaction, where the property does not remain in possession of the Sheriff, but is redelivered to the defendant on his giving a delivery bond. *Block v. Walker*, 578
2. And a levy upon the property of one defendant is no satisfaction as to his co-defendant. Nothing but actual satisfaction releases the co-defendant. *id*
3. And such levy upon the property of one defendant cannot be set up as a defence in an action of garnishment against the debtor of the co-defendant. *id*
4. The reception by the officer holding the execution, of bank notes, &c., to the full amount of the execution, from one defendant, is no defence to a person garnisheed as debtor of a co-defendant, unless the plaintiff authorized the receipt of such funds, or accepted them after they were received; because, otherwise, it was no actual satisfaction. *id*
5. The true rule is, that where a levy under execution is made upon personal property of sufficient value to satisfy the execution, and the property so seized does not again come to the possession of the debtor, the levy is a satisfaction as to that debtor, and as to him only. But if the debtor again receive the goods, there is no satisfaction. *id*
6. The satisfaction dates from the time of the levy. So long as the property remains in the hands of the Sheriff, or in *custodia legis*, the debtor has the general property in it, with which he does not part until the sale, for until then it is possible that he may again take the property. *id*
7. Actual satisfaction by sale of one defendant's property is a satisfaction as to other defendants. *id*

See ACCORD AND SATISFACTION.

SERVICE.

See RETURN OF PROCESS.

SEAL.

1. If two persons sign with one seal they are held both to have sealed the instrument. *Mapes v. Newman*, 469

SET OFF.

1. Where the plaintiff and defendant had rented a house by parol agreement as co-tenants, and after the rent had become due, the defendant executed to the landlord his individual bond for the whole rent, the execution and delivery of the bond operated by law as an extinguishment of the *joint* liability of the plaintiff and defendant, and the plaintiff was forever discharged from all liability on his parol contract. *Howell v. Webb*, 360
2. And the giving such bond was a payment of the rent, and raised a legal liability on the part of the plaintiff to refund his portion, which was good matter for a plea of set-off, if the plaintiff agreed to the change, either expressly, or by tacit acquiescence. *id*
3. And when this matter is pleaded as set-off, if the record fails to show that the original renting was by contract in writing, it will be presumed, against the plaintiff, to have been merely by parol. *id*

See ASSIGNMENTS, 9 to 22.

SPECIAL TERMS.

See COURTS, 4 to 19.

STATUTES, CONSTRUCTION OF.

1. Of assignments. *Block v. Walker*, 4
2. Of the Revised Statutes as to demurrers. *Davies v. Gibson*, 115
3. Of assignments of 1807. *Small v. Strong*, 198
4. Of 1838 concerning Commissioner of Public Buildings. *The State v. Stevenson*, 260
5. Territorial statute of attachments. *Jones v. Buzzard*, 415

SUITS AGAINST THE STATE.

1. There being no legislative provision, authorizing the Circuit Court of Chicot county to issue a writ of certiorari to the Auditor of Public Accounts, a writ issued to the county of Pulaski is void. *The Auditor v. Davies et al.*, 494
2. A sovereign state or government cannot be sued without some legislative provision authorizing such proceeding; and the statute must be strictly followed. *id*
3. All suits against the State must be brought in the Circuit Court of the county in which the seat of government is situate, and be against the State by

name; and the process must be a summons executed by delivering a copy to the Auditor. *id*

4. The Auditor is by law to keep his office at the seat of government; consequently he is beyond the reach of the jurisdiction of the Chicot Circuit Court, or any order of the Judge of that Circuit for or against the State. *id*

T

TAXATION.

1. All property in this State must, by the Constitution, be taxed according to its value; and the tax thereon must be equal and uniform throughout the State. *Stevens et al., v. The State*, 291
2. The Legislature has no power to discriminate and fix upon one description or species of property a greater tax than that fixed by law upon every other description or species of property of equal value subjected to taxation. *id*
3. Every individual may lawfully acquire and possess any species or description of property, if he does not thereby destroy or deprive some other person of his property, or some enjoyment thereof, in which he is protected by law, *id*
4. But property when acquired and possessed, must be so kept and disposed of as not to injure any paramount legal right of another, or affect injuriously the public morals, or public good, so far as they are protected by law. *id*
5. The Legislature cannot restrict any one from making or purchasing a billiard table; but may, by law, so regulate or restrict the use of it, as to prevent any injury therefrom to the public morals or public good. *id*
6. No individual in this government does, or can, have or possess any privilege which is not common to every other citizen of the State, until it is created by law, and acquired by him under authority thereof, and in the manner therein designated. *id*
7. The Legislature can tax no privileges except those created by law and legally existing at such time as the law imposing the tax directs it to be levied thereon. *id*
8. The Legislature cannot, by prohibiting the exercise of a right common to every citizen, and then allowing its exercise upon the payment of a tax, create it a privilege. *id*
9. The privileges made taxable by the Con-

stitution, are such as cannot be exercised or enjoyed by any citizen or integral part of the community, without the intervention of some statutory provision, granting to, or conferring upon, one or more individuals the right of doing some particular thing, as the right of banking, keeping a ferry, &c. *id*

10. It might also embrace such as enjoy any privilege by way of exemption from the performance of onerous duties imposed upon the great mass of the community, if such exemption be first created by statute; but this admits of great doubt. *id*

11. Keeping a billiard table cannot be made a privilege, under that clause of the Constitution which provides that all property shall be taxed according to its value; but that the Legislature may tax merchants, hawkers, pedlars, and privileges. It is not a *privilege*, and therefore the law imposing a tax of five hundred dollars for every six months on each keeper of a billiard table is unconstitutional and void. *id*

12. The right of keeping a stallion is strictly and emphatically a common right, not derived from, or enjoyed by virtue of, any grant from the government; nor is it enjoyed by part, and denied to others, of the community. Consequently it cannot be metamorphosed into a privilege, subject to taxation as such. *Gibson v. The County of Pulaski*, 309

13. That provision of the statute of Nov. 7, 1836, which provides for levying a tax, for the privilege of keeping a stallion, is unconstitutional. *id*

TREASURER.

1. The office of State Treasurer, as well as those of Secretary of State, Sheriff, Coroner, Constable, and Militia officers, are all Executive. *The State v. Hutt*, 282

2. They belong to the Executive department, for the Constitution assigns them to that division of power, and makes all their duties necessarily of an Executive character. *id*

3. The office of Justice of the Peace is as much a Judicial office as the office of Supreme Judge. *id*

4. No person therefore can, at the same time, hold the offices of Treasurer and Justice of the Peace. *id*

5. A person holding one office has a right, if elected to another which he cannot hold at the same time, to accept it, but in

so doing he vacates, *eo instanti*, the first office. *id*

6. Where a Justice of the Peace, therefore, was elected and commissioned State Treasurer, and accepted the latter office, he wholly vacated and annulled his office of Justice of the Peace. *id*

TRESPASS.

1. In trespass, it is error to instruct the jury that if the defendant entered first upon the plaintiff's premises by his permission and consent, and afterwards committed any unlawful act, he is to be considered as a trespasser *ab initio*. *Bel-lard v. Noaks*, 45

2. Where a party enters by public license or authority of law, and afterwards, in the prosecution of his designs, commits any unwarrantable act, the law regards him as a trespasser *ab initio*, and holds him fully answerable for all the injury committed; and he is liable, not only for the unlawfulness of the particular act, but also for his original entry. *id*

3. But where a party enters upon the premises of a private person, by his express or implied consent and permission, and afterwards commits any unlawful act, he is only amenable for his subsequent unwarrantable conduct, and for nothing more. *id*

4. In such case, the original entry, being lawful, cannot be made unlawful by any subsequent illegal act. And if a contrary instruction is given, the judgment will be reversed. *id*

TROVER.

1. An unlawful levy upon property, as under a void writ of attachment, is such a tortious taking and conversion as will support trover. *Jones v. Buzzard*, 415

2. An attorney is not liable in the discharge of his official duty, for claims put into his hands to collect as such attorney, unless it be shown that he has been guilty of culpable negligence in the prosecution of the suit, and thereby the plaintiff has lost his debt. *Sevier v. Holliday*, 513

3. Nor can he be held liable for money collected by him as an attorney, unless a demand be made upon him and he refuses to pay it over, or remit it, according to the instructions of his client. *id*

V

VERDICT.

1. A verdict in *detinue*, finding the slaves in the declaration mentioned, to be the property of the plaintiff, affixing their value severally and respectively, finding their detention by the defendant, and awarding a certain amount of damages for the detention, is valid. *Lenox v. Pike*, 14
2. Where there is any defect, imperfection or omission, in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet, if the issue joined be such as necessarily requires, on the trial, proof of the facts so defectively or improperly stated, or omitted, and without which it is not to be presumed that either the Judge would have directed the jury to give, or the jury would have given, a verdict, such defect, imperfection or omission, is, by the Common Law, cured by the verdict. *Sevier v. Holiday*, 512
3. After verdict, nothing is to be presumed, except what is expressly stated in the declaration, or what is necessarily implied from the facts that are stated: that is, where the *whole* is stated to exist, the existence of the *parts* is implied; and where the *chain* is alleged to exist, the existence of the *component links* will be implied after verdict. *id*
4. If the plaintiff wholly omits to state a good cause or title of action, even by implication, matters which are neither stated or implied need not be proved at the trial, and there is no room for intentment or presumption; as the intentment must arise from the verdict, when considered in connection with the issue upon which it was given. *id*
5. If any thing essential to the plaintiff's action be not set forth, though the verdict be found for him, he cannot have judgment; because, if the essential parts of the declaration be not put in issue, the verdict can have no relation to it; and if it had been put in issue it might have been found false. *id*
6. In an action against an attorney, for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person calling for so many dollars, to bring suit on, recover and collect of a third person, for the use and benefit of the plaintiff, for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict upon it in favor of the

plaintiff will not sustain the judgment. *id*

7. No title to the note, in the plaintiff, is stated by, or implied in, any of these allegations; and no facts are stated, which could not be proven, without at the same time establishing the plaintiff's title to the note, or legal right to receive the proceeds. *id*
8. Nor is it stated or implied that the note was due when so delivered, nor to whom it was payable, nor what sum, (if any thing,) was due upon it. *id*
9. Such a count shows a defective title, and not a title defectively stated: and no proof is admissible under such a count, which can make it good. *id*

W

WITNESS.

1. A party to the record, cannot in general be examined as a witness in the case. *Ballard v. Neaks*, 45
2. A co-trespasser or co-tortfeasor, is not in general a competent witness on either side. A joint trespasser who has suffered judgment to go against him by default, is not a competent witness for the plaintiff. *id*
3. In both criminal and civil cases, a party who is put on trial at the same time with other co-defendants, cannot be used as a witness until he has been first acquitted or convicted. A verdict restores his competency provided it does not render him infamous. *id*
4. To entitle one defendant, where several are put on trial together, to a verdict, first in his own case, it must satisfactorily appear to the court which tries the cause, that no evidence has been adduced against him, and that his testimony is important for the other defendants. *id*
5. This privilege is awarded him, upon the express condition that there has been no proof against him, tending to prove the charge laid: for if there are facts or circumstances proved on the trial, going to establish his guilt, though they may not be sufficient to convict him, still he has no right to have his case left to the jury, and afterwards to come in and testify. *id*
6. Where the plaintiff has closed his testimony, and has wholly failed to adduce any evidence against some of the defendants, it is the duty of the court to permit the jury to retire and find a verdict of acquittal as to those defendants.

if the others wish to use them as witnesses, and show by affidavit or otherwise that their testimony is material. *id*

WORK AND LABOR.

See QUANTUM MERUIT.

WRITS AND PROCESS.

1. Where the suit below was commenced by a writ of *capias*, to which no judicial seal was attached, the writ was illegal, and imposed no legal duty on the defendant to observe and obey its mandate, nor could it be the foundation of a judgment by default. *Woolford v. Dugan*, 131
2. No writ or process, issuing out of any Circuit Court, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues, according to the principles of the common law. *The Auditor v. Davies*, 494
3. Consequently, a Circuit Court of one county cannot run its writ or process into any other county, without some legislative provision on the subject. *id*
4. There being no provision, authorizing the Circuit Court of Chicot county to issue a writ of certiorari to the Auditor of Public Accounts, a writ issued to the the county of Pulaski is void. *id*

5. All suits against the State must be brought in the Circuit Court of the county in which the seat of government is situate, and be against the State by name; and the process must be a summons executed by delivering a copy to the Auditor. *id*
6. A certiorari to the Auditor, to bring before the Circuit Court the proceedings of the Auditor in issuing a distress warrant, is, to all intents and purposes, a suit against the State. *id*
7. All proceedings on such a writ are, therefore, extra-judicial, and *coram non judice*. *id*

WRITS OF ERROR.

1. A writ of error *only* lies to bring up the record and proceedings of an inferior court, when such court proceeds according to the course of the common law. *Gibson et al. v. Rogers*, 334
2. It, therefore, does not lie to reverse any final decision, order, or decree in chancery, rendered by the court below. *id*
3. Under the Constitution and laws of this State, an erroneous decision of the Circuit Court, sitting in chancery, cannot be reached by a writ of error; but may be relieved against by a writ of certiorari, or an appeal regularly taken by the party aggrieved. *id*

THE END.

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